FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

THE REUBEN H. DONNELLEY CORPORATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9079. Complaint, April 13, 1976—Final Order, Jan. 10, 1980

This order requires, among other things, a New York City firm to cease, in connection with the publication of the Official Airline Guide—North American Edition, or any successor publication, from failing to publish connecting flight listings for commuter air carriers in the same manner as those published for certificated air carriers; or otherwise arbitrarily discriminating against any air carrier or class of air carrier in the publication of such listings.

Appearances

For the Commission: *James C. Egan, Jr.*, *Steven A. Newborn*, *Elizabeth J. Keefer* and *W. Risque Harper*.

For the respondent: *William H. Buchanan*, New York City and *Elroy H. Wolff*, *Thomas J. Hearity* and *George W. McBurney*, *Sidley & Austin*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating Section 5 of the Federal Trade Commission Act, (15 U.S.C. 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

I. Definitions

1. For purposes of this complaint, the following definitions shall apply:

"Direct flight" means scheduled passenger air transportation service which, regardless of the number of stops between cities of origin and destination, does not require a change in aircraft;

"Connecting flight" means scheduled passenger air transportation service which requires a change in aircraft between cities of origin and destination served by separate direct flights, whether such change in aircraft involves more than one air carrier or a single air carrier.

II. Respondent

2. Respondent, The Reuben H. Donnelley Corporation, is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal [2]office and place of business at 825 Third Ave., New York, N. Y. It is a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., 299 Park Ave., New York, N. Y., which in 1974 had combined operating revenues in excess of $504 million and total assets in excess of $345 million. Respondent is engaged, *inter alia*, in the publication, distribution and sale of various publications relating to travel and transportation, including the "Official Airline Guide—North American Edition" ("OAG"), a bi-monthly publication which combines the flight schedules and fares of all scheduled airlines in the United States, Mexico, Canada and the Caribbean into one directory.

III. Jurisdiction

3. From offices located at 2000 Clearwater Drive, Oak Brook, Illinois, respondent distributes and sells the OAG to subscribers located throughout the United States. The policies, acts and practices of respondent as alleged herein at all times relevant hereto have been in or have affected commerce within the meaning of the Federal Trade Commission Act.

IV. Nature of Trade and Commerce

4. The OAG is now and at all times pertinent hereto has been the only publication distributed and sold in the United States that combines the passenger flight schedules of all domestic air carriers, and it is now and for many years has been the standard reference for airline ticket offices, travel agents, businesses, and the public generally in ascertaining available flight schedules between city pairs in North America. Approximately 172,000 copies of each bi-monthly OAG issue are sold to such subscribers.

5. Scheduled air passenger transportation service in the United States is advertised, sold and furnished to the public by (1) air carriers whose routes and fares are regulated by the Civil Aeronautics Board pursuant to certificates of convenience and necessity or other economic authority issued by it ("certificated air carriers"); (2) air carriers

operating pursuant to Part 298 of the Economic Regulations of the Civil Aeronautics Board without regulation of routes or fares ("commuter air carriers"); and (3) air carriers whose routes and fares are regulated in varying respects by exclusive authority of the individual State in which each such carrier's operations are limited and confined ("intra-state air carriers"). [3]

6. Certificated air carriers consist of "trunkline" air carriers whose routes include service between and among major metropolitan airport facilities in the United States and North America; "local service carriers" whose operating authority is limited to short-haul service as distinguished from service rendered by trunkline air carriers; and "foreign air carriers" which, *inter alia,* also offer short-haul service in North America pursuant to recognized certificates or equivalents issued by their sovereign governments. A substantial portion of passengers flying local service and foreign air carriers begin or end their journey on connecting flights with trunkline air carriers.

7. Commuter air carriers operate either short-haul service between major metropolitan airport facilities and surrounding smaller community airport facilities, or between such smaller communities, or both. A substantial portion of passengers flying commuter air carriers either begin or end their journey on connecting flights with trunkline air carriers.

8. Intra-state air carriers operate direct flight service over routes between major metropolitan airport facilities and smaller communities or between such smaller communities, or both, within the same state.

9. Except to the extent that competition has been restrained, lessened and eliminated by the acts and practices of respondent as alleged by this complaint, in many instances individual commuter air carriers are engaged in substantial competition with one or more certificated air carriers by offering both direct and connecting flight schedules between the same city pairs, and individual intra-state air carriers are engaged in substantial competition with one or more certificated air carriers by offering direct flight service between the same city pairs.

10. Significant elements of competition between certificated air carriers and commuter air carriers and between certificated air carriers and intra-state air carriers include flight departure times in relation to flights of each other, inclusion of these schedules in the OAG, and the sequence in which such schedules are published in the OAG.

11. At all times hereinafter referred to, publication policies of the OAG have been formulated and/or modified by respondent following consultations with certificated air carrier members of the Air Traffic

Conference of America, a division of the Air Transport Association of America, and the OAG continuously has represented itself as being the "Standard Reference of the Air Traffic Conference of America. [4]

V. Acts, Practices, and Methods of Competition

12. For many years, and at least since 1969, respondent has maintained a publication policy with respect to the content and format of the OAG pursuant to which schedules of available flights between city pairs are published in separate categories in the following sequence when and where applicable: (1) direct flights of certificated air carriers; (2) connecting flights of certificated carriers; (3) direct flights of intra-state carriers, and (4) direct flights of commuter air carriers. Within each such category, flights are listed chronologically by order of departure.

13. For many years, and at least since 1971, respondent has refused to accept for publication any schedules of connecting flights of commuter air carriers, even though commuter air carriers offer and sell such service to the public and have made requests of respondent for inclusion of said schedules in the OAG.

14. For many years, and at least since 1971, respondent has refused requests of intra-state and commuter air carriers to publish their direct flight schedules in the OAG on the same terms and conditions as apply to the publication of direct flight schedules of certificated air carriers by integrating the schedules of all air carriers serving given city pairs into single chronological listings.

15. In refusing to modify its OAG publication policies as aforesaid, respondent has solicited and relied upon the views of certificated air carrier competitors of commuter and intra-state air carriers acting under the auspices of the Airline Guides Committee of the Air Traffic Conference of America.

16. The effects of respondent's OAG publication policies as aforesaid are and have been to foreclose commuter air carriers from disseminating information as to available connecting flight schedules to the public; to suggest and/or advise the public that direct flights of certificated air carriers are to be given preference over those of intra-state and commuter air carriers; and to lessen the competitive significance of schedules of direct flight departure times of intra-state and commuter air carriers in relation to those of certificated air carriers. [5]

17. As a result of the acts, practices, and methods of competition as alleged, competition in the development, advertising, offering of sale, and sale of scheduled passenger air transportation in the United States

has been, or may be, stabilized, controlled, hindered, lessened, foreclosed or restrained.

VI. Violation

18. The acts, practices, and methods of competition alleged herein by respondent, both individually and in combination with others, constitute unfair acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

MARCH 6, 1979

PRELIMINARY STATEMENT

By a complaint issued on April 13, 1976, The Reuben H. Donnelley Corporation ("Donnelley") is charged with a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. [2]

Respondent Donnelley is a subsidiary of the Dun & Bradstreet Companies, Inc., which in 1974 had combined operating revenues of over $500 million and total assets of about $345 million. Donnelley is a publishing company which publishes the "Official Airline Guide—North American Edition" ("OAG"), a directory of flight schedules and fares for scheduled air transportation. The OAG is published twice monthly and is sold to air carriers, travel agents, businesses and the general public.

The complaint alleges that the OAG is the only publication sold in the United States that combines the passenger flight schedules of all domestic air carriers and that it is the standard reference for ascertaining flight schedules between city pairs in North America.

Scheduled air passenger transportation in the United States is provided by three categories of airlines: certificated air carriers, commuter air carriers, and intrastate air carriers. The complaint alleges that Donnelley has refused to publish flight schedules for commuter and intrastate air carriers on the same terms as apply to the publication of flight schedules of certificated air carriers. More specifically, the complaint alleges that respondent has refused: (1) to publish in the OAG schedules of connecting flights involving commuter air carriers,[1] and (2) to chronologically integrate schedules of commuter air carriers and intrastate air carriers with those of certificated air carriers.

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[1] In December 1976, respondent started publishing the connecting flights of commuter air carriers.

The complaint further alleges that Donnelley violated Section 5 "individually and in combination with others," stating that Donnelley's policies have been formulated and modified by respondent "following consultations" with certain certificated air carriers, and that Donnelley has "solicited and relied upon the views of certificated air carrier competitors" in refusing to change its publication policies. [3]

By an answer filed May 28, 1976, respondent admitted some but denied many of the allegations of the complaint. Among the more important issues raised by the answer, respondent: (1) denied that significant competition exists among the three categories of air carriers; (2) stated that there are numerous sources of passenger flight schedule information other than the OAG; (3) stated that it had solicited the views of certificated air carriers concerning separate listing of certificated air carriers, commuter air carriers, and intrastate air carriers, but that it has neither relied nor acted upon those views; (4) stated that these matters are not subject to the jurisdiction of the Federal Trade Commission; and (5) stated that the relief sought, compelling Donnelley to publish flight schedule listings in a manner conflicting with Donnelley's judgment, would violate the First Amendment to the United States Constitution.

Pursuant to prehearing orders, counsel for the parties stipulated that (1) the complaint does not allege unlawful monopolization in the publication and sale of passenger flight schedules of domestic air carriers; and (2) the complaint does not allege unlawful effects on companies other than air carriers, including potential competitors of the respondent in the sale and distribution of passenger flight schedules for domestic air carriers. (Joint Statement filed September 24, 1976.)

After issue was joined, respondent filed a motion to dismiss, asserting that the Commission lacks subject matter jurisdiction over the acts of a publisher who sells and distributes information about air carriers who are themselves subject to CAB jurisdiction. The claim was based on Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2), which provides that carriers subject to the Federal Aviation Act of 1958 are exempt from the Commission's jurisdiction.

By an order dated September 21, 1976, I invited the CAB to file an *amicus* brief commenting on the issues presented by the complaint. On February 2, 1977, the General Counsel of the CAB filed an *amicus* brief denying, in effect; that the CAB had primary jurisdiction over this matter, or that the CAB had sanctioned the conduct alleged in the complaint. The *amicus* brief states that it is "clear that the [4]exercise of Commission jurisdiction would not cause a collision with the Board's jurisdiction over air carrier competition." After further briefing, I denied the motion to dismiss by an order dated March 30, 1977. By an order dated July 12, 1977, the Commission denied Donnelley's petition for extraordinary review, holding that there had been no abuse of discretion.

Respondent Donnelley sued in the United States Court for the Northern District of Illinois to prevent further action in the administrative proceeding. I set hearings in the administrative case to begin on September 9, 1977. Well into the defense of the case, I received on November 13, 1977, an order from United States District Court Judge Bernard M. Decker, finding lack of Federal Trade Commission jurisdiction, enjoining further hearings, and ordering that the Commission dismiss the complaint. *Donnelley Corp.* v. *FTC*, 1977-2 Trade Cases ¶ 61,721 (N.D. Ill. 1977).[2] By an order dated December 20, 1977, Judge Decker vacated his previous order enjoining further administrative proceedings, holding that Donnelley had failed to exhaust its administrative remedy.[3] *Donnelley Corp.* v. *FTC*, 1977-2 Trade Cases ¶ 61,783 (N.D. Ill. 1978). [5]

This interruption in the administrative proceeding resulted in an eleven month delay.[4] Defense hearings in *Donnelley* resumed on October 16, 1978, and ran through November 17, 1978. Complaint counsel had rebuttal on December 1, 1978.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and the exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding. The following abbreviations have been used:

CX – Complaint counsel's exhibit, followed by its number and the referenced page(s);
RX – Respondent's exhibit, followed by its number and referenced page(s);
CPF – Complaint counsel's proposed findings;
RPF – Respondent's proposed findings. [6]

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[2] I therefore set Dkt. 9080, *Kaiser Aluminum & Chemical Corp.*, for trial, to commence December 1, 1977.

[3] On cross-appeal, the United States Court of Appeals for the Seventh Circuit held on August 2, 1978, that venue in Chicago was improper and transferred the case to the district court in Washington, D.C. *Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). Ruling from the bench, Judge Gesell dismissed Donnelley's complaint on September 28, 1978.

[4] Before the administrative hearings in the *Donnelley* case could resume, I finished the trial in the *Kaiser* case, wrote the initial decision in *Amway Corporation*, Dkt. 9023, which I had deferred to start the *Donnelley* hearings (initial decision filed June 23, 1978), and wrote the initial decision in the *Kaiser* case (initial decision filed October 18, 1978).

FINDINGS OF FACT

Glossary

1. A "certificated air carrier" is an air carrier that holds a certificate of public convenience and necessity issued by the Civil Aeronautics Board ("CAB") authorizing the air carrier to fly its routes in commerce in the United States. (Fugere 210; 49 U.S.C. 1371–72)

2. The CAB has created by regulation a classification of air carriers known as "air taxi operators" which operate smaller airplanes (not more than 7,500 pounds payload and having thirty or fewer passenger seats) but which do not hold a CAB certificate. (14 CFR 298)

3. "Commuter air carriers" do not hold CAB certificates. An air taxi which flies passengers on at least five round trips per week between two or more points and publishes flight schedules which specify the times, days of the week and places between which such flights occur, is a "commuter air carrier." (14 CFR 298.2(f)) An air carrier may operate as a commuter air carrier on some of its routes while holding CAB certification on other routes. (CX 188A–F; Nelson 4395)

4. An "intrastate air carrier" is an air carrier which operates solely within a state of the United States and which does not hold a certificate of public convenience and necessity or foreign air carrier permit issued by the CAB. (Griffin 884) An air carrier may operate as an intrastate air carrier on some of its routes while operating as a commuter air carrier on other routes. (Dzendolet 2624–26)

5. A foreign air carrier is any person, not a citizen of the United States, who engages in air transportation between any place in the United States and any place outside thereof. (49 U.S.C. 1301(38)) [7]

6. "Trunk air carriers" are certificated air carriers which operate across the country. An example of a trunk air carrier is American Airlines. (CX 196D; CX 196Z80–Z81) "Local service air carriers" are certificated air carriers. In the late 1940's the CAB started certifying these carriers to provide air service to smaller cities. A federal subsidy payment program was instituted for these carriers. They have since evolved from "feeder" airlines into "regional" carriers with only certain of their operations eligible for subsidy. An example of a local service or regional carrier is Piedmont Airlines. (CX 108 at 7; CX 196Z77)

7. "Replacement carriers" are commuter carriers which agree to substitute for local service carriers on routes that the certificated carriers are obligated to serve but are not doing so at a profit. (CX 107 at 9)

8. A "city pair" is two cities between which there is scheduled airline service. (Fugere 211)

9. A "direct flight" is a flight between a city pair, either nonstop, or, if there are stops, normally involving no change of aircraft or flight number. (Complaint and Answer ¶1; Fugere 211)

10. A "connecting flight" is two or more direct flights used in conjunction with each other to provide transportation between a city pair. (Answer ¶1; Fugere 212)

11. "On-line connections" are connections between two or more direct flights of the same air carrier. (Fugere 211)

12. "Interline connections" are connections involving direct flights of at least two separate air carriers. (Fugere 212).

13. "Interline agreements" are agreements among and between carriers, involving a variety of business arrangements such as ticketing, reservation procedures, joint use of facilities, joint reservations. Such agreements are filed with and approved by the CAB. (Fugere 212–13)

14. "Free or industry connections" are connections submitted by air carriers to respondent and published by respondent without charge to the air carrier based on limitations established by respondent. (RX 66Z18–Z62; Fugere 213–14; Nelson 2487) [8]

15. "Paid connections" are connections which do not qualify as free connections under the limitations established by respondent, and they are published by respondent at the expense of the air carrier that requests the listing. (RX 66Z18–Z62; Fugere 215; Nelson 2502–03)

Respondent

16. Respondent, The Reuben H. Donnelley Corporation ("Donnelley"), is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal office and place of business at 825 Third Ave., New York, New York. It is a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., 299 Park Ave., New York, New York. Donnelley is engaged in the publication, distribution and sale of publications relating to travel, including the Official Airline Guide-North American Edition ("OAG"), a twice-monthly publication which combines into one directory the passenger flight schedules and fares of substantially all the scheduled air carriers in the United States, Mexico, Canada and the Caribbean. (Complaint ¶2; Answer ¶2)[5] In 1962, Donnelley acquired the OAG from its publisher, American Aviation Publications, Inc. (CX 24A; Reich, 1181)

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[5] Effective January 1, 1979, Official Airline Guides, Inc., a Delaware corporation and a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., assumed responsibility for publication of the Official Airline Guide, formerly published by the Transportation Guides and Services Division of The Reuben H. Donnelley Corporation. (RPF p. 7)

Interstate Commerce

17. Respondent is now and has been at all relevant times engaged in selling and distributing the OAG to subscribers located throughout the United States, from its offices located at 2000 Clearwater Drive, Oak Brook, Illinois, and from other Donnelley facilities. Respondent is therefore engaged "in commerce" and its business activities "affect commerce," within the meaning of the Federal Trade Commission Act. (Complaint and Answer ¶¶3, 4; Fink 1370; Budzic 3092; Davidoff 3170) [9]

Official Airline Guide

18. The OAG was first published as early as 1943 under the title "Universal Airline Schedules." (CX 52C) At first it merely reproduced timetables of each scheduled air carrier. (RX 19D, RX 572, RX 573)

19. In 1958, the OAG started publishing flight schedule listings in the "to-city" format which currently is used in the OAG, rather than simply in a series of individual air carrier's timetables. (RX 19D) The OAG organized flight schedule listings by displaying in alphabetical order the cities to which there was scheduled air carrier passenger service, displaying under each of these cities in alphabetical order the cities from which there was scheduled air carrier passenger service to the city of destination. (RX 258, 571, 573, 574)

Publishing Policy

20. Before December 1, 1976, respondent published in the OAG four separate categories of airline schedules in the following sequence:

Certificated Air Carrier - direct flights (published with no headings).

Certificated Air Carrier - connecting flights (published under the heading "Connections").

Intrastate Air Carrier - direct flights (published under the heading "Intra-State").

Commuter Air Carrier - direct flights (published under the heading "Commuter Air Carriers").

(Complaint and Answer ¶12; CX 174; RX 7A; RX 16A) [10]

21. Before December 1, 1976, respondent published in the OAG three categories of direct flight schedules: certificated carriers (including foreign and replacement carriers), intrastate, and commuter carriers, with each category separate and in chronological order:[6]

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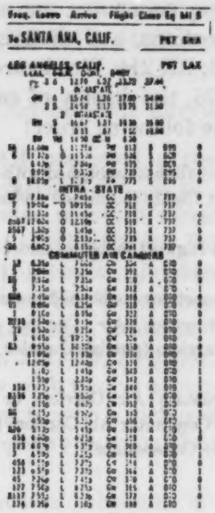
[6] *See* CX 118, pp. 1101-02 for letter symbols of airlines; CX 118, pp. 1107-11 for explanation of other abbreviations. (First 9 lines under "Los Angeles" in above schedule deal with fare information.)



To SANTA ANA, CALIF. PST SNA

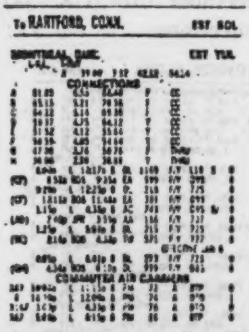
LOS ANGELES, CALIF. PST LAX

INTRA - STATE

COMMUTER AIR CARRIERS

(From CX 113 at 951, showing certificated carriers (here Hughes Airwest (RW)) listed above intrastate carriers (here Air California (OC)) and commuter air carriers (here Golden West (GW)).) [11]

22. Before December 1, 1976, respondent published in the OAG schedules for connecting flights for certificated carriers only. Connections on commuter carriers were not published in the OAG. (Complaint and Answer ¶13):



To HARTFORD, CONN. EST BDL

MONTREAL, QUE. EST YUL

CONNECTIONS

COMMUTER AIR CARRIERS

(From CX 113 at 401, showing connecting flight listings for certificated carriers placed before direct flight listings of commuter air carriers (here Pilgrim (PM).)

23. On December 1, 1976, respondent began publishing two addi-

tional categories of service, commuter air carrier connections and intrastate air carrier connections, and changed the order of display. (Complaint and Answer ¶13; RX 214; Woodward 4189) [12]

24. On December 1, 1976, the display of categories and service in the OAG was changed to the following order:

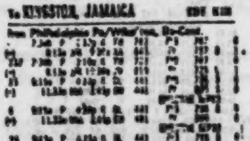
Certificated Air Carrier direct flights (published with no heading).
Commuter Air Carrier direct flights (published under the heading "Commuter Air Carriers").
Intrastate Air Carrier direct flights (published under the heading "Intra-State Air Carriers").
Certificated Air Carrier connections (published under the heading "Connections")
Connections involving Commuter Air Carriers or Commuter Air Carriers/Certificated Air Carriers (published under the heading "Commuter Air Carrier Connections").
Connections involving Intrastate Air Carriers or Intrastate/Certificated Air Carriers or Intrastate/Commuter Air Carriers (published under the heading "Intra-State Air Carrier Connections").

(RX 214; RX 258)

Foreign Air Carriers

25. Though they hold no CAB certificate, foreign air carriers have their schedules chronologically merged in the certificated air carrier columns in the OAG. (Complaint and Answer ¶¶5, 12; Ceresa 987, 988, 1000, 1004) [13]

26. Connecting flight information for foreign air carriers was in the OAG even before December 1976 (CX 174) and is included with certificated air carrier connections:



(From RX 258 at 536, showing foreign carrier (BW) listed with certificated connections.)

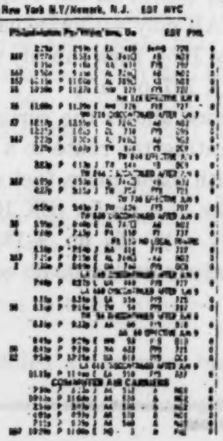
27. Of the 118 air carriers now listed by the OAG as certificated, 79 are foreign air carriers. (RX 517 at 1498)

Replacement Carriers

28. In 1967, the CAB approved a contract between Allegheny Airlines (a certificated carrier) and an air taxi operator pursuant to which the air taxi operator provided service over routes which were certificated to Allegheny. [14](RPF 68) This arrangement (known as "Replacement Flights") permits Allegheny to maintain its route authority and provide service to smaller communities with small aircraft at much lower cost than would be incurred using Allegheny's larger aircraft. (Howard 2727–29, 2735–36) At present, Allegheny has CAB-approved contracts with twelve commuter air carriers ("Allegheny commuters") pursuant to which such commuter air carriers provide service on behalf of Allegheny to some 27 communities. (Howard 2714, 2727)

29. Allegheny commuters' schedules in the OAG have been since 1967 and still are merged chronologically with certificated air carrier direct flights and certificated air carrier connecting flights. (CX 190; Nelson 3414) Prior to December 1, 1976, Allegheny commuters' connecting flight information was in the OAG. (CX 174)

30. Since September 1, 1969, the flight schedules for Allegheny Commuters, both direct and connecting, have been chronologically merged in the certificated air carrier columns in the OAG with a symbol in the shape of a square following the flight number (CX 174 at 3; RX 130; RX 131, RX 132):

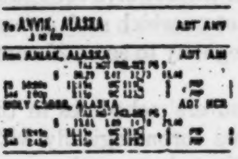


(From CX 112 at 1109.) [15]

In the "Abbreviations and Reference Marks" section of the OAG, the symbol is defined as follows:

[Symbol] Following Flight Number Indicates A Replacement Flight Operated By A Commuter Air Carrier On Behalf Of A Certificated Air Carrier Pursuant To A CAB Approved Agreement. (RX 571 at 4)

31. In addition to the Allegheny commuters, 30 commuter air carriers operate replacement flights for certificated carriers Alaska Airlines and Wien Air Alaska, Inc. and receive the same display treatment as Allegheny Commuters in the OAG. (Nelson 3462)[7]



(From RX 258 at 85, showing commuter replacement flights for Wien Air Alaska.)

32. About 700 of the 50,000 direct flights listed in a recent issue of the OAG were replacement flights operated by commuter air carriers but listed in the certificated air carrier category. (Nelson 2521) [16]

33. Certificated airlines are obligated to serve smaller communities pursuant to a CAB route authorization even though they do so at a loss. In that event, the CAB may authorize payment to the certificated carrier of a subsidy. Since 1954, such subsidy payments have amounted to well over $1 billion. (CX 107, p.7 n.1)

34. Replacement service allows the certificated carriers to fulfill their obligation by delegating the route to a commuter carrier. These replacement carriers, with their more fuel efficient airplanes, serve these smaller communities at a profit. (CX 106 at 16, 76) They cannot receive a federal subsidy. (CX 107 pp. 9-13) In 1975, there were 27 commuter carriers operating replacement service for 11 certificated carriers. (CX 107 p.10)

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[7] Not all commuter carriers operating replacement service for other certificated carriers receive "Allegheny treatment." (RX 135A; Nelson 3466; Britt 2545)

Relevant Market

35. Respondent advertises that the OAG is the "standard reference of the Air Traffic Conference of America."[8] (CX 113, front cover) The OAG is the only complete listing of scheduled flights in North America. (CX 203B(1); CX 204A(1); CX 113 leaf between 2–3) The OAG is the primary source of flight schedule information to the flying public and the primary marketing tool for carriers. (May 565; Fugere 220) It is referred to in the airline industry as the "Bible." (Kyzar 1575; Griffin 851; CX 28B) [17]

36. In addition to the OAG, there are four competitive sources of information about scheduled passenger air transportation. These four sources are the ABC World Airways Guide ("ABC"); computerized schedule information; individual airlines' printed schedules; and radio, television and newspaper advertising. The record reveals that none of these sources offer a real alternative. (McKenna 904; Kyzar 1612; Muse 812) When asked if he could name any actual competitors of the OAG other than ABC, the former Executive Vice President of the OAG testified that there were no significant competitors. (Reich 1299)

37. The ABC is a listing of scheduled flights much in the same format as the OAG but is directed toward international travel. (CX 202B–C; Fugere 238)

38. In 1973 ABC had a total circulation of 1,792 in the United States and Canada while in that same year the OAG had a total circulation of 137,796 in the United States and Canada. (CX 45A)

39. A witness with 14 years experience in the airline industry had only seen one copy of ABC in his life. (May 567) Another representative of a certificated air carrier testified he had never seen a single copy while employed by that carrier. (Mueller 1525) Some air carrier witnesses had never heard of ABC. (Muse 814; Britt 2597)

40. The ABC does not compete with the OAG in providing domestic flight information. (May 567; Jaques 656, 660; McKenna 904; Fink 1410; Mueller 1525; Budzic 3093; Davidoff 3178; Howe 1868; Reich 1295, 1300; CX 202C)

41. SCIP is the acronym for Schedule Change Input Package. (Lobach 4125) SCIP tapes are computer tapes upon which airline schedule information has been coded. When the information on the SCIP tapes is called for by the operator of the computer terminal it is electronically displayed on a cathode ray tube ("CRT"). (Whiteside 454; McKenna 904) [18]

42. While many scheduled air carriers have access to SCIP tape

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[8] The Air Traffic Conference of America is the trade association of certificated air carriers. (CX 203 (54); CX 204 (54))

capabilities, only a very small percentage of travel agencies and corporate travel offices use SCIP tapes. (May 568; McKenna 905–06; Ceresa 1012; Reich 1301–02; Davidoff 3153, 3154; Lobach 4219) SCIP tapes are not a marketing substitute for the OAG. (Autry 714; Griffin 854; Ceresa 1012)

43. The cost of a CRT for an office that does about three million dollars a year in business would be about fifteen thousand dollars a year. (Jaques 657) The cost of subscribing to the OAG is currently $98.44 annually. (RX 571, advertising leaf between pp. 2–3)

44. The use of computerized schedule displays has not changed the growth rate of the OAG. (Lobach 4231; Reich 1208)

45. Even those airlines, travel agents and corporate travel offices that do have computer scheduling capability also subscribe to the OAG. (Kyzar 1613; Budzic 3094)

46. The limited use of CRTs is due in part to the fact that SCIP tapes contain less flight schedule information than the OAG. (Budzic 3085; Lobach 4125; Fink 1428)

47. Most scheduled air carriers print their own individual flight schedules which they furnish to their passengers. These schedules contain only the carriers' own flights. (Fugere 237; McKenna 903; Ceresa 1011–12) The schedules usually have only local or limited distribution. (May 566; Whiteside 432; Autry 710; Muse 814; McKenna 903; Britt 2598) [19]

48. Individual timetables are also expensive. One witness testified that it cost his company approximately $.50 per schedule. (Muse 840)

49. Airlines, travel agents and corporate travel offices do not normally use individual flight schedules to obtain flight information and book flights. (Jaques 660; Fink 1415, 1416; Fugere 237; Autry 710; Griffin 852; Ceresa 1011–12; Davidoff 3154)

50. Scheduled air carriers sometimes use radio, television and newspapers to advertise their flights. In some instances those advertisements contain limited flight schedule information. Where flight schedule information is advertised, it is only shown for the individual carrier and even then it is limited to a few city pairs. Commuter carriers cannot afford to advertise nationally. (Fugere 236–37; Whiteside 433; May 566; Autry 710; McKenna 904)

51. Airlines, travel agents and corporate travel departments do not rely on radio, television or newspaper advertisements to obtain flight information and book flights. (Jaques 659; Fugere 237; Autry 710; Griffin 852; Davidoff 3154)

Conspiracy

52. The Airline Guides Committee is a committee of the Air Traffic Conference of America ("ATC"), a division of the Air Transport Association of America, ("ATA") the trade association of certificated airlines. (CX 203(43); CX 204(43); CX 89A) At Airline Guides Committee meetings, each certificated carrier was entitled to send one authorized representative and each representative had one vote. (Mueller 1497) The only persons entitled to vote at Airline Guides Committee meetings were authorized representatives of certificated air carriers. (Mueller 1500) [20]

53. On September 10, 1971, OAG staff sent a telegram to the ATC. The OAG stated that at the next meeting of the Airline Guides Committee the: "OAG would like to discuss the merger of Certificated, Commuter and Intrastate Air Carrier schedules. OAG thoughts will be presented October 7. We would appreciate carriers coming to the meeting prepared to discuss their respective management opinions." (CX 14)

54. On September 13, 1971, the ATC sent out to all members of the Committee the agenda of the meeting of the Airline Guides Committee to be held October 7, 1971. (CX 89)

55. Item 7 on the agenda, "Merger of Schedules," was proposed by Mr. Howe, the Publication Manager of the OAG, with the approval of Robert Parrish, the Publisher of the OAG. (Howe 1912–13; Reich 4218; Woodward 4216; CX 14; CX 89C)

56. Item 7 on the agenda of that meeting reads:

> OAG Staff has suggested that the Airline Guides Committee consider the merger of Certificated, Commuter and Intrastate carriers schedules in the guide publications. Direct flight listings would be listed together chronologically as currently shown.
>
> Additionally, Commuter and Intrastate carriers would have the opportunity to purchase online connections and Commuters would purchase connections with Certificated carriers and visa-versa [sic]. Only two categories of listings, direct and connections, would be required instead of the present four. OAG plans to provide further details at the meeting. Members, however, should be prepared to discuss their respective management opinions. (CX 89C)

57. Members of the committee did seek management opinions. (CX 102)

58. The meeting took place on October 7, 1971, at the Mayflower Hotel in Washington, D. C. (CX 89) [21]

59. Item 7 was discussed during that meeting. (Howe 1698; Mueller 1501–02) Representatives of the OAG were present during the discussion. (Mueller 1508; CX 9A–1)

60. The official minutes of the meeting, published by the ATC and

distributed to all certificated carrier members and to the OAG, state that "During discussion [of Item 7] it became obvious that there was no support for the proposal, therefore, no further action was required." (CX 9H)

61. Notes of the meeting taken by Mr. Howe, the Publications Manager of the OAG, state that: "the carriers were with the exception of [American and National Airlines] against the merger of schedule listings." (CX 10D) He also stated that "[m]ost carriers felt that noncertificated carriers could be included in connections, though, this, of course, would weaken our argument against keeping them out of [merged] schedule listings." (CX 10D)

62. Mr. Howe's notes also state that one certificated carrier was concerned at the meeting that "non-certificated carrier[s] had no restrictions on routes and therefore could parallel the [routes of] certificated carriers at will." (Howe 1769; CX 19C)

63. At the October 7, 1971 meeting the certificated carriers voted not to change the OAG's method of separate, descending listings of the schedules for certificated, commuter and intrastate carriers. (Howe 1872; CX 89C; CX 66A; Mueller 1502, 1508)

64. In 1975 of the 118 commuter carriers publishing schedules in the OAG, 78 purchased 408 subscriptions to the OAG. The remaining 40 may have purchased some additional subscriptions under individual rather than corporate names. (CX 135A) During that year certificated air carriers purchased over 30,000 subscriptions to the OAG, (CX 30)

65. Certificated air carriers are substantial customers of Donnelley products and services including subscriptions to the OAG and other publications, paid connections, and SCIP tapes. (e.g. CX 82B; CX 71) In 1975, seven certificated carriers paid Donnelley well over $3 million. (CX 71D; CX 73C; CX 77C; CX 80B; CX 82B)[9] [22]

66. Some certificated carriers attempt to use their position as large customers to influence respondent's publishing policies. (CX 118; CX 87)

Competition

Commuters

67. On April 15, 1975, there were 432 city pairs served by direct flights of both commuter and certificated air carriers. (CX 135E; CX 203(5))

68. In the year ending June 30, 1974, commuter air carriers served

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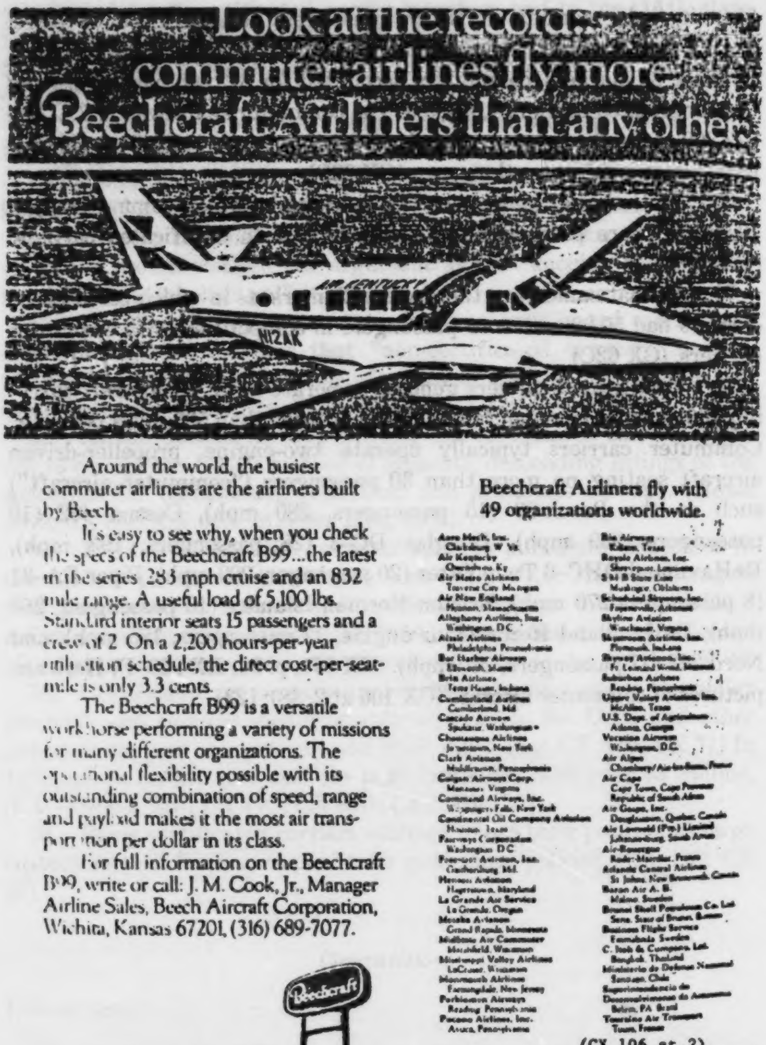
[9] This figure does not include several of the larger air carriers such as American, Eastern, and Pan American, as well as other certificated carriers, who refused to supply this information, nor does it include substantial amounts paid by other certificated carriers. (CX 70; CX 74; CX 75; CX 78B CX 81B; CX 90; CX 91)

514 city-pair markets in which passengers totaled 1,000 or more. Eighty-two of those markets were also served by certificated carriers. In those 82 markets, commuters accounted for 872,300 passengers and the certificated carriers 4,053,760. The commuter share was 17.7%. The 872,300 passengers represented 19.6% of the 4,440,762 commuter passengers in 48 states that year. (CX 62B)

69. In that year there were 19 markets in which commuters had 10,000 or more passengers in competition with certificated carriers. (CX 62C)

70. In that same year there were 25 markets in which certificated carriers had 50,000 or more passengers in competition with commuter carriers. (CX 62C)

71. Certificated carriers generally operate large jet aircraft carrying 100 or more passengers and flying at more than 500 miles per hour. Commuter carriers typically operate two-engine, propeller-driven aircraft seating no more than 30 passengers ("commuter aircraft") such as the Beech-99 (15 passengers, 280 mph), Cessna 402 (10 passengers, 239 mph), Douglas DC-3 (28 passengers, 193 mph), DeHavilland DHC-6 Twin Otter (20 passenger, 209 mph), Piper PA-31 (8 passengers 270 mph), Britten-Norman Islander (10 passengers, 260 mph), DeHavilland Heron (four engine, 17 passengers, 195 mph), and Nord 262 (27 passengers, 240 mph). (RX 571, p. 30; RX 225-F) Here are pictures of commuter aircraft (CX 106 at 2, 38): [23]



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  Philadelphia, Pennsylvania
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Cascade Airways
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Chautauqua Airlines
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  Gaithersburg, Md.
Henson Aviation
  Hagerstown, Maryland
La Grande Air Service
  La Grande, Oregon
Mesaba Aviation
  Grand Rapids, Minnesota
Midstate Air Commuter
  Marshfield, Wisconsin
Mississippi Valley Airlines
  LaCrosse, Wisconsin
Monmouth Airlines
  Farmingdale, New Jersey
Perkiomen Airways
  Reading, Pennsylvania
Pocono Airlines, Inc.
  Avoca, Pennsylvania
Rio Airways
  Killeen, Texas
Royale Airlines, Inc.
  Shreveport, Louisiana
S M B Stage Line
  Muskogee, Oklahoma
Scheduled Skyways, Inc.
  Fayetteville, Arkansas
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  Atlanta, Georgia
Vacation Airways
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  Chambery/Aix-les-Bains, France
Air Cape
  Cape Town, Cape Province
  Republic of South Africa
Air Gaspe, Inc.
  Douglastown, Quebec, Canada
Air Lowveld (Pty.) Limited
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  Malmo, Sweden
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  Seria, State of Brunei, Borneo
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  [illegible] Sweden
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Desenvolvimento da Amazonia
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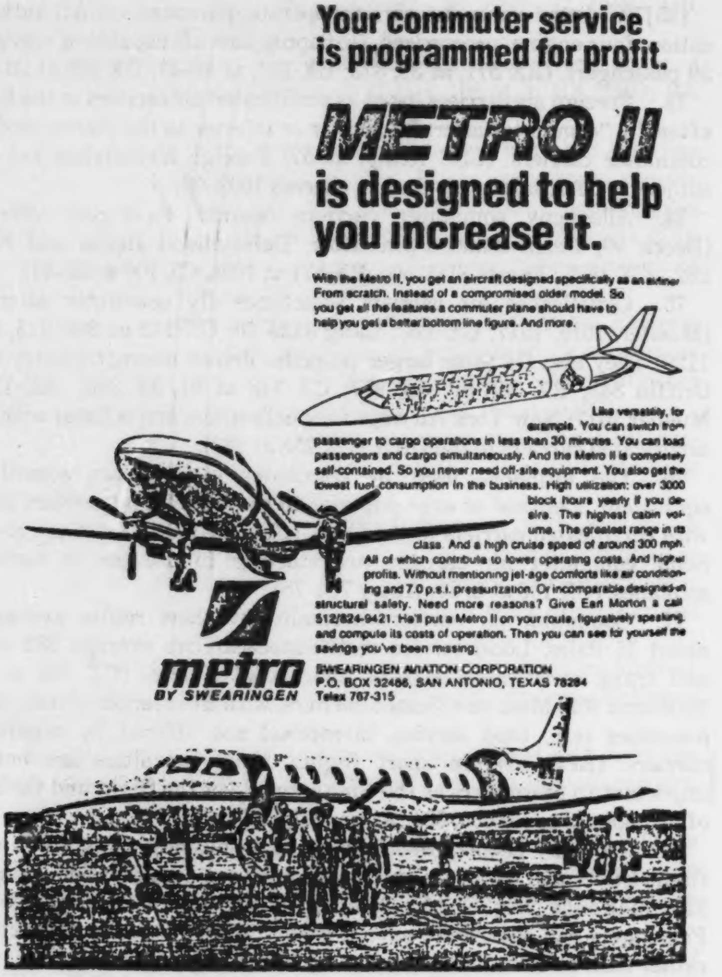
(CX 106 at 2)



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(CX 106 at 38)

[25]72. Some commuter carriers operate, pursuant to CAB authorization, four engine, pressurized, turboprop aircraft capable of carrying 50 passengers. (RX 571, at 30, 373; CX 107, at 46-47; CX 106 at 90-91)

73. Foreign air carriers listed as certificated air carriers in the OAG often fly "commuter aircraft" similar or inferior to the planes used by commuter carriers. (CSC Reply, at 57) Foreign air carriers are not subject to FAA safety regulation. (Ceresa 1002-03)

74. Allegheny commuter carriers operate commuter aircraft. (Beech 99, DeHavilland Twin Otter, DeHavilland Heron and Nord 262—CX 182L; Shorts SD3-30—RX 571 at 1058, CX 106 at 56-57)

75. Certificated air carriers sometimes fly commuter aircraft. (Mueller, 1515, 1517; CX 12C; Lang 3129-30; CX 112 at 205, 713, 624, 1129) They also fly some larger propeller driven aircraft. (Autry 697, Griffin 848; RX 258 at 976, 977; CX 112 at 91, 93, 340, 752, 1129; Mueller 1517) New York Airways flies helicopters and is listed with the certificated carriers in the OAG. (CX 258 at 783)

76. The airplanes used by commuter carriers are sometimes equivalent, identical or even superior to those flown by carriers listed with certificated carriers in the OAG. (CPF 98-101; CX 106 pp. 89-91) Some commuter air carriers are starting to use jet or turbojet airplanes. (CX 106 at 8, 84; Autry 774-75)

77. Commuter air carriers normally fly short routes averaging about 75 miles. Local service certificated carriers average 182 miles and trunk certificated carriers average 578 miles. (CX 106 at 92; McKenna 952) Most certificated carriers, with their larger planes, offer amenities (*e.g.*, food service, lavatories) not offered by commuter carriers. (RPF 184) In short flights, those amenities are not as important to passengers as the time schedule of the flight and the kind of airplane. (Jaques 669, 684; Autry 707) [26]

78. To many people, especially those on business trips, the time a flight leaves and arrives is the most important consideration. (Fugere 320; McKenna 958; Griffin 850-51; Jaques 660, 686; Nelson, 3472) Passengers can sometimes save time by using commuter connections rather than certificated connections. (CPF 95; May 577)

79. Of 665 airports in the country, 256 are served solely by certificated carriers, 210 solely by commuters and 199 jointly by both classes of carriers. (CX 107 at 34) Commuter facilities at airports are often not as good as those for certificated carriers. (CX 20F; CX 107 at 53-55) Some commuters share terminal space with certificated carriers. (CX 106 at 37, 74-75, 83) Commuter carriers sometimes use more favorably located airports than competing certificated carriers. (CPF 96; Autry 702; Dzendolet 2629)

80. The number of commuter carriers has been increasing. In 1960

there were five in the OAG, 1966 - 36, 1967 - 50, 1968 - 75, 1969 - 110, 1974 - 140, 1976 - 163. (CX 106 at 5)

81. Passengers carried by commuters increased from about 4 million in 1969 to over 7 million in 1975. (CX 106 at 3; RX 328D; RX 344Z22)

82. Since at least 1971, all certificated carriers have had interline agreements with most commuter carriers. These agreements provide for joint fares (at a discount), and through ticketing and luggage handling arrangements. (CX 106 at 62–75; CX 12B; CX 22B; CX 20D) Many commuters now share the computerized reservation systems of major airlines. (CX 106 at 68, 94; CX 20D)

83. Pilgrim, a commuter air carrier, competes with Delta, Eastern, United, TWA, Allegheny and American, all certificated air carriers, as well as an "Allegheny commuter" which is integrated with certificated carriers in the OAG. (Fugere 215–16, 240, 287; CX 112 at 5) [27]

84. Royale, a commuter air carrier, competes with Texas International, Delta Airlines, Southern and Braniff, all certificated air carriers. (May 554; CX 112 at 5)

85. Prinair, a commuter air carrier, competes with Eastern, a certificated carrier. (Ceresa 976, 1027; CX 112 at 5) Prinair competes as well as LIAT, ALM, Winair, Air BVI, Air France, Air Guadaloupe. (Ceresa 1000–01) These are all foreign air carriers which are integrated with certificated air carriers in the OAG. (CX 112 at 5; CPF 25)

86. Metro, a commuter air carrier, competes with Frontier Airlines, Texas International and Delta, all certificated air carriers. (McKenna 899, 902; CX 112 at 5)

87. Rocky Mountain, a commuter, competes with Aspen Airways, Frontier, Continental Airlines and Braniff, all certificated carriers. (Autry 693, 709; CX 112 at 5)

88. Allegheny, a certificated carrier competes with Altair, a commuter. (Howard 2855, 2857; CX 112 at 5) Altair also competes with "Allegheny commuters" which are treated as certificated carriers in the OAG. (Howard 2855; CPF 27)

89. Frontier, a certificated air carrier, competes with Rocky Mountain, Metro, Scheduled Skyways and other commuter carriers. (Mueller 1509, 1514; CX 112 at 5)

90. Texas International, a certificated air carrier, competes with commuters. (CX 41; CX 112 at 5)

91. Air New England, Inc., a certificated carrier, competes with commuter carriers. (CX 188B)

92. Commuter carriers competing with certificated carriers set their fares based on the fares charged by certificated carriers flying the same city pairs. (Fugere 379; Autry 695, 702; McKenna 901; May

562; Whiteside 411; Ceresa 1035) These certificated carriers also react to fares charged by the commuters. (Whiteside 411; Mueller 1510–11, 1514) [28]

Intrastate

93. Intrastate and certificated carriers often have served the same city pairs. For example, Southwest Airlines, which was an intrastate air carrier, competed on all its city pairs (over 25) with certificated carriers. (Muse 809–12) Air Florida and Air California, which were intrastate carriers, also competed with certificated carriers in various city pairs. (Griffin 848–49; Davis 1439)

94. Intrastate carriers fly airplanes comparable to certificated carriers. (Muse 807; Griffin 847; Davis 1430; Cooke 3333)

95. Certificated carriers have lost market share in various city pair markets as a result of intrastate competition. (Muse 890; Cooke 3327)

96. Intrastate carriers compete with certificated carriers. (Nelson 3394; Cooke 3326–29)

97. Prior to November 9, 1977, intrastate carriers were prohibited from exchanging passengers and luggage with certificated air carriers. On that date, by statute, some such interlining was allowed. 49 U.S.C. 1371(d)(4). The Airline Deregulation Act of 1978, Pub. Law 95–504, 92 Stat. 1706 (eff. Oct. 24, 1978) provides that intrastate air carriers may now become, in effect, certificated carriers providing interstate transportation upon receiving CAB authorization. Four (Air California, Pacific Southwest Airlines, Southwest Airlines and Air Florida) have already done so and their schedules will now be listed under certificated air carriers in the OAG. (RX 576) One air carrier in Illinois and three carriers in Alaska continue to operate as intrastate carriers. (RPF 328)

Safety

98. Regulations promulgated by the Federal Aviation Administration (FAA) govern the safe operation of aircraft with a gross weight of 12,500 pounds or less. (Schwind 3524) Most aircraft operated by commuter carriers are in this category. (Schwind 3573–74) [29]

99. The FAA has different, more stringent, regulations governing the operation of the larger aircraft usually operated by certificated carriers and by most intrastate carriers. (RX 196P–R)

100. The certificated air carrier industry has a better safety record than the commuter air carrier industry. (RPF 203–08; 211–13) The largest 50 commuter air carriers, which carry about 90% of all

commuter traffic, are statistically safer than the certificated air carriers. (Dzendolet 2666)

Reliability

101. Reliability of an air carrier measures whether it flies published schedules on time with listed equipment. The percentage of complaint letters received by the CAB regarding flights of certificated and commuter air carriers is about the same. (CX 135B) Commuters operated over 96% of flights scheduled in 1974, which is comparable with certificated carriers. (CX 107 p.5; CX 189B; McKenna 948–51) Certificated carriers and larger commuter carriers are more reliable than smaller, newer commuter carriers in performing flights at the scheduled time. (McKenna 920–21; Dzendolet 2642; Salfen 3272) Some commuters have better reliability records than almost all certificated carriers. (CX 20B)

Injury

Connections

102. The OAG publishes certain connections free based on various time and frequency factors. If a carrier wishes to have a connection that does not qualify as a free connection published in the OAG, it must pay the OAG to list that connection. These connections are known as "paid connections." (Findings 14, 15) Prior to December 1, 1976, the OAG would not publish free or paid connections for commuter air carriers. (RX 214) [30]

103. Paid connections cost approximately $2.30 per month per connection. (Whiteside 416) In 1975, Delta paid respondent over $160,000 to list paid connections in the OAG. (CX 69) TWA paid over $181,000 (CX 71); Braniff over $115,000 (CX 72); Allegheny over $280,000 (CX 73); Continental over $150,000 (CX 77); Northwest Airlines over $216,000 (CX 82B); and United Airlines over $300,000 (CX 80B; *see also* CX 23A(4); CX 70; CX 74; CX 75; CX 78; CX 81; CX 82; CX 91)

104. "Constructing a connection" refers to obtaining a connecting flight by using two direct flights listed in the OAG. "Constructing a connection" is difficult and time consuming. (Kyzar 1618; Ceresa 981–84; Fink 1353–58, 1371; Budzic 3107–08)

105. Before December 1, 1976, respondent refused to publish commuter air carrier connecting flight schedules in the OAG. (Complaint and Answer ¶ 13) At least as early as 1969 the OAG refused requests by commuter air carriers and their trade association to

publish connections for commuter carriers. (Autry 715, 725; McKenna 907; CX 55; CX 58; CX 203(31), (32); CX 204(31), (32); RX 114A–B; CX 19A; RX 19J) In 1968 and again in 1969 one certificated airline requested that such connections be shown. (RX 1B; CX 171P; RX 102)

106. Where connections are not listed in the OAG there is little chance that the availability of such service will be known by those booking flights or by the travelling public. (CX 28B)

107. Commuter carriers were substantially injured by respondent's refusal to print commuter connections. (Fugere 223, 309–12; Whiteside 409–10, 416–17; May 571; Autry 716–18, 725–26; McKenna 908, 943; Ceresa 980, 990) Commuter carriers have a great need for connecting flight information to be published in the OAG since 70% of their passengers are to or from certificated carriers. (CX 12B; RPF 139; Whiteside 413) Respondent's failure to publish commuter connections also injured the traveling public. (CX 189C; CX 20E) [31]

108. Commuters were injured by respondent's policy prior to December 1, 1976, of publishing connections for replacement carriers but not for commuters. (Fugere 248–49)

109. Commuters were injured by respondent's policy prior to December 1, 1976, of publishing connections for foreign carriers but not for commuters. (Ceresa 987–1002, 1013–14)

110. After the OAG started to print commuter connections, commuter carriers saw a substantial increase in connecting passengers. (Fugere 228–29; Autry 716; McKenna 908; Whitside 416–17)

111. In 1971 respondent knew that this problem was "critical" to the commuters and that they were anxious to buy connections in the OAG. (CX 19A; CX 15A) In 1975, respondent's top official recognized "there are a number of very efficient and reliable commuter carriers to whom a disservice is being done" because of the OAG's refusal to print commuter connections. (CX 201)

112. Donnelley has been publishing connections for certificated carriers in the OAG since it acquired the publication in 1962. (RX 573) After the Federal Trade Commission started the investigation which resulted in the complaint in this case being issued (RX114D; Reich 1273–74; Woodward 4170–71), Donnelley decided to publish connecting flight schedule listings for commuter and intrastate air carriers in October 1975. (Answer, Exhibit B) Donnelley announced this change on April 22, 1976, and started publishing connections for noncertificated carriers on December 1, 1976. (RX 214A; Lobach 4138)

Schedule Integration

113. About 1969, commuter and intrastate air carriers started requesting the OAG to integrate the schedules for all scheduled air

carriers—to list the flights of all scheduled air carriers in chronological order for each city pair. (Autry 718; McKenna 908; Reich 1194–96) [32]

114. Users of the OAG select the first acceptable flight listed in the OAG for the city pair. (McKenna 907) Even experienced users of the OAG read from the top of the page to the bottom and select the flight listed first ("first listing") (Ceresa 980; Lang 3135; Whiteside 406) The user of the OAG usually makes a choice of flight before ever reaching the commuter or intrastate categories. (Fugere 309–12; May 572; Muse 816; Griffin 851–52; Fink 1412) Airline sales personnel will book the first convenient flight in chronological order, even when that flight is not on their own airline. For this reason, some carriers have arranged to have their own custom schedules printed, showing their own flights first. (Fugere 352–54)

115. Being listed below certificated carriers in the OAG's flight listings results in an injury to commuter air carriers (Fugere 232–34; Whiteside 404–08; May 617–18; Autry 703, 716–18, 725; McKenna 943–47; Ceresa 980, 1032–34), intrastate carriers (Muse 823–25; Griffin 851), and to the travelling public. (Autry 702–03; Fugere 349–51)

116. The OAG lists certificated air carriers within any city pair in order of their time of departure. Where two flights leave at exactly the same time, the one that arrives first is listed first in the OAG. Prior to 1971, the carriers were listed alphabetically when flights had identical departure and arrival times. Thus, if an American Airlines flight and an United Airlines flight had identical departure and arrival times, the *A*merican Airlines flight would have been listed before that of the *U*nited Airlines flight. (CX 89B)

117. Because of complaints received from certificated air carriers, respondent started to consider randomizing direct flight listings in the OAG. For example, where two or more certificated flights had identical departure and arrival times, one flight would be selected at random to be listed first rather than alphabetical listing. (CX 9H, CX 123B) [33]

118. In an Airline Guide committee meeting in 1971, all carriers whose codes began with A–M opposed randomizing and all carriers except one whose codes began with N–Z favored randomizing. (Northwest was the exception. United is its main competitor.) All of the certificated carriers recognized the competitive advantage in being listed first. (CX 31–35; CX 88A–D; CX 98; Kyzar 1615) The publisher of the OAG also recognized this competitive advantage. (CX 36C)

119. In early 1972, respondent changed its policy and started randomizing direct flight listings where the flights left at about the same time (still keeping separate categories for certificated, commuter

and intrastate carriers). (CX 123) An IBM program was used to insure fairness in the random selection. (CX 123B) The OAG later similarly randomized connections. (CX 49G)

120. Allegheny insists on having Allegheny commuters listed with certificated carriers and not below with other commuters because first listing is a better marketing tool. (CX 128; Howard 2812–13)

121. Prior to the randomization controversy, certificated carriers tried to achieve first listing by changing their flight time to leave one minute earlier than their competition in order to be listed first. (CX 34, CX 35, CX 36A, CX 88A, CX 98N–Q; CX 185)

122. The importance of first listing is also indicated by the fact that several air carriers have commissioned the OAG to publish custom guides for use by the airlines' own reservation agents. (CX 52Z; Lobach 4129–30) These custom guides follow the OAG format, but list the flights of that carrier ahead of the flights of competing carriers. (CX 153, 154)

123. The ABC World Airways Guide, the OAG's competitor outside the United States, randomizes flight listings as well as integrating the schedules of commuters, intrastate and certificated carriers. (CX 36A, CX 39B; CX 12C)

124. SCIP tapes integrate the schedules of commuters and certificated carriers. (Fugere 277, 387; CX 11B)

125. The OAG international edition integrates flight schedules of foreign commuter airlines with those of foreign certificated airlines. (CX 12A) [34]

DISCUSSION

The following discussion summarizes and supplements the findings of fact and presents conclusions of law.

Introduction

Scheduled passenger air transportation in this country is conducted primarily by air carriers holding certificates of public convenience and necessity from the Civil Aeronautics Board. "Trunk" certificated carriers usually fly between large cities and average almost 600 miles a trip. "Local service" certificated carriers usually fly between smaller cities and between small and large cities and average about 200 miles a trip. (Finding 77) These certificated carriers usually fly large jets carrying 100 or more passengers.

In the last two decades commuter air carriers have become increasingly important in passenger air transportation. These carriers are not certificated by the CAB and they pick their own routes and set their own fares. They generally fly between small communities and between those towns and larger airports connecting with certificated carriers. Generally they fly smaller planes,[10] and average about 75 miles per trip. (Finding 77)

The number of commuters has increased from 36 in 1966 to 163 in 1976. (Finding 80) They carried over 7 million passengers in 1975. (Finding 81)

Because commuters can choose to enter or leave markets without CAB authorization, some of them have entered some heavy traffic markets in competition with certificated air carriers. (Findings 68–70, 83–91) About 20% of the passengers in these markets are carried by commuters. (Finding 68)

Commuters have been successful in the "feeder" role of carrying passengers to and from larger airports where they [35]can connect with certificated carriers. They do this so well that eleven local service certificated carriers have withdrawn from these routes, with CAB authorization, by entering into "replacement agreements," whereby the commuter carriers take over the route. Even though the local service carrier may have been losing money on these city pairs, and often was receiving a federal subsidy, the commuters, with their fuel efficient planes, can usually perform this service at a profit.[11] In 1975 there were 27 commuter carriers operating replacement service for 11 certificated carriers. (Finding 34)

Commuter air carriers are now an important part of the scheduled passenger air transportation industry.

Respondent publishes the Official Airline Guide. The OAG is the only complete list of scheduled airline flights in North America. (Finding 35)[12] It is the size of the Washington, D.C. "Yellow Pages" telephone book and it comes out monthly, with a mid-month supplement. It costs about $100 a year and is used by ticket agents for airlines, travel agents, and scheduling personnel for corporations. While there are other specialized sources of flight information, there is no substitute for the OAG. (Finding 36)

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[10] The Airline Deregulation Act of 1978 increased the maximum size of commuter planes to those having a capacity of less than fifty-six passengers. 49 U.S.C. 1371, 92 Stat. 1732 (Oct. 24, 1978).

[11] Texas International, a certificated air carrier, charged a fare of $21 between College Station, Texas, and Dallas, and lost $41 per passenger. Davis Airlines, a commuter, charged $20 and made a profit. (CX 107 p. 9; CX 174 p. 155)

[12] The OAG also provides information about fares, equipment, airports, meals, stops, and ground transportation. (RX 571)

The OAG is arranged alphabetically by the city the passenger is going to; under each such city the cities from which the passengers are coming are also listed in alphabetical order. The schedules are divided into direct flights (without changing planes) and connections (involving a change of planes). Until December 1, 1976, respondent did not publish connections for commuter air carriers. (Finding 22) As a direct result of the Federal Trade Commission investigation in this case, respondent started publishing commuter connections on December 1, 1976. (Finding 112)

The OAG city pair format is further divided into categories by class of carrier: certificated carriers, commuter carriers, and intrastate carriers. The schedules of certificated [36]carriers have always come first. (Findings 20–24) The flights within each category are in chronological order. Users of the OAG choose a flight by reading the schedule from the top down and generally choose a flight before ever reaching the commuter or intrastate categories. (Finding 114)

Being close to the top of the schedule ("first listing") is competitively very important. For example, certificated air carriers, whose names placed them alphabetically below their competitors when both left at the same time, insisted that the listings be selected at random rather than alphabetically. (Findings 116–19)

Respondent's discriminatory policy has competitively injured commuter air carriers, especially respondent's refusal to publish connections since 70% of the commuters' passengers are connecting with other carriers. (Findings 106–10, 115)

Rather than the result of objective editorial decision, this policy has resulted from respondent's economic affiliation with the certificated carriers (Findings 64-66, 103) and from a conspiracy. At a meeting with OAG representatives on October 7, 1971, a committee of about twenty certificated carrier representatives voted to continue the OAG policy of separate carrier categories and of refusing to publish commuter and intrastate carrier connections. (Findings 52–63)

Respondent's main arguments for the discriminatory publishing policy have been that commuters were not reliable in flying according to their announced schedules and that they were not as safe as certificated carriers.[13] (Reich 1206) The record in this case shows that those arguments are baseless. (Findings 98–101) The only accurate relevant comparison of safety and reliability of air carriers can be made when they use similar airports and are flying over similar terrain in similar weather.[14] [37]

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[13] Nothing in the record shows that intrastate carriers, which fly the same large jets as competing certificated carriers (Finding 94), are any less reliable than certificated carriers.

[14] (Daendolet 2962–63.) The CAB qualifies its Schedule Arrival Performance publication for January 1979 with this statement:

(Continued)

Furthermore, respondent does indeed publish schedules for noncertificated carriers. To be consistent, then, respondent can only use the safety and reliability argument to show that the schedules of noncertificated carriers should be designated in some way. Respondent already designates replacement carriers such as the "Allegheny" commuters and publishes their schedules among the certificated carriers. (Findings 28–30) The same system could easily be used to designate noncertificated carriers.

Respondent fears that, if the schedules were merged, passengers would buy tickets on commuter flights without realizing that they would be flying on smaller aircraft. While this is possible in some cases, it is unlikely to happen frequently. Travel agents generally inform their customers whenever a smaller aircraft is involved in a flight. (RPF 242) Furthermore, this argument is not consistent with respondent's practice of publishing schedules of replacement and foreign carriers with certificated carriers,[15] even though those flights involve small aircraft. (Findings 28, 73)

But for the conspiracy found in this case, there is no good reason why respondent should not merge schedules in the OAG for certificated and noncertificated carriers. Respondent already does so in other publications. Respondent merges the schedules of similar carriers in the International edition of the OAG. In 1971 the Publisher of the OAG wrote (CX 12A–B):

> There is a question in our mind as to why we should continue separation of commuter air carriers in the United States when we actually merge the schedules of similar operations in our International OAG. Many of the small overseas carriers operate aircraft similar to those used by U.S. Commuters. Why penalize our own "small" airlines?

Another example of this inconsistent behavior exists. The 1978 Washington, D.C. commercial telephone directory ("Yellow Pages") contains a listing for "airline companies." The airline companies listed alphabetically thereunder include both certificated and commuter airlines. For example, American Airlines, Braniff International, Continental [38]Airlines and Delta Air Lines are certificated airlines. (RX 571 p. 1498) Altair Airlines, Inc.,[16] Colgan Airways Corp., Commuter Airlines, Cumberland Airlines, and Pioneer Airlines Inc. are commuter

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Since these data do not constitute a representative sample of any carrier's total flights or of the industry as a whole, they should not be used for intercarrier comparisons in any way except in individual markets. The results shown shall not be "extrapolated" to obtain a "system" average for any carrier.

[15] Some certificated carriers also fly small aircraft. (Finding 75)

[16] Altair became certificated in 1978 but at the time of the printing of the Yellow Pages it was a commuter. CX 258 p. 1221.

airlines. (RX 571 pp. 1499–1500) The publisher of the Yellow Pages is respondent Donnelley. (CX 24A)[17]

Other sellers of passenger air schedules also merge the certificated and noncertificated listings. The ABC World Airways Guide, the OAG's competitor outside of the United States, does so. (Finding 123) Computerized systems do so. (Finding 124) Respondent's reason for not merging the schedules was without doubt based on the conspiracy found herein, and not on the differences in the carriers they suggest.

The Meeting

In 1971 commuter air carriers were carrying over 4 million passengers, 70% of whom were connecting with certificated airlines. The OAG did not print commuter connections nor did it integrate their schedules with certificated airlines. Mr. Howe, the Publications Manager of the OAG, and Mr. Parrish, the Publisher, became convinced that this should cease and put their reasons in writing. (CX 11, CX 12, CX 15, CX 19) They found: that some certificated carriers wanted to purchase connections to noncertificated carriers; that noncertificated carriers were anxious to purchase connections (which would result in increased OAG sales); that this was a "critical problem" for noncertificated carriers; that commuter carriers may be "far superior" to small foreign airlines which appear in OAG and other international air schedule publications; that [39]changing the format to eliminate the separation of classes of carrier would save lines of copy and give the OAG a less confusing format; and that since foreign carriers, replacement carriers and some certificated carriers were flying small planes, "equipment is now a weak argument for continued separation." (CX 12C) The executives concluded that when the policy of separation of schedules was first established it was justified: "The scheduled Air Taxi or Commuter type of service was quite new, it was unregulated, at times it was unreliable, and there were many differences between the two services." (CX 12A) They stated that now however: "Over the intervening years these differences have been reduced in number and we are now convinced that in the interest of our subscribers and the future growth of the nation's air transportation system, these schedules should be merged as soon as it is feasible to do so." (*Ibid.*) The only reasons against the merger of the schedules noted by the executives were the "certificated carrier objection" and possible subscriber objections. (CX 11B)

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[17] Neither the Yellow Pages nor the CAB publication in footnote number 14 are in this record. While these documents at most are alternative evidence, *Safeway Stores, Inc.* v. *FTC*, 366 F.2d 795, 800 (9th Cir. 1966), *cert. denied* 386 U.S. 932, respondent will have the "opportunity to show to the contrary," 5 U.S.C. 556(e), in a motion for reconsideration or before the Commission which has the ultimate factfinding responsibility in this proceeding. Administrative agencies should not "ignore the realities of life and disregard common knowledge" in reaching their decisions. *Continental Can Co.* v. *United States*, 272 F.2d 312, 315 (2d Cir. 1959).

They put the matter of merged schedules and commuter connections as "Item 7" on the agenda of the next meeting of the Airlines Guide Committee, for consideration by the certificated carriers. (Findings 52–56) The notice requested the representatives to seek management opinions of the subject. (Findings 56–57) The meeting took place on October 7, 1971 at the Mayflower Hotel in Washington, D.C. (Finding 58) Item 7 was the most important and primary subject discussed at the meeting. (Howe 1691–92) Peter E. McKenna attended the meeting representing Texas International, a certificated carrier. Mr. McKenna testified as to his recollection of the meeting (McKenna 910):[18]

> Q. And can you recall any specific conversation or statement by any representative of the Reuben Donnelley Corporation relating to the question of the integration of commuter schedules into the OAG and the listing of commuter connections in the OAG?
>
> A. Yes, I can. I recall a statement by Reuben Donnelley's Bob Parrish or Red Howe. I don't recall specifically who made the statement. [40]
>
> The statement, I do recall, was in substance a statement to airline personnel—that they should determine—the airlines should determine whether they were going to do business with commuters or not.
>
> That on the one hand, airlines were entering ticketing and baggage agreements, joint fares, a variety of interline activities, while on the other hand, he was being told to keep commuters out of the book.

The representatives of the certificated air carriers discussed the matter. A symbol next to the flight number would have satisfied some carriers. (CX 19C) One carrier "was concerned in that the non-certificated carriers had no restrictions on routes and *therefore could parallel the certificated carriers at will.*" (Finding 62; emphasis added.) The carriers voted. (Finding 63) Except for American and National Airlines, the carriers voted "against the merger of schedule listings." (Finding 61; CX 66A) They also agreed that to include commuter connections in the OAG would weaken their argument against merged schedules. (Finding 61)

After the Airline Guides Committee meeting, Mr. Howe and Mr. Parrish changed their minds about merging schedules and printing commuter connections. (Howe 1829–32) When the Airline Guides Committee was officially disbanded in 1973 because of allegations of conspiracy, the representatives of the certificated carriers agreed to continue to meet with the OAG in an unofficial capacity. (CX 67)

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[18] From his demeanor on the stand, and based upon his whole testimony, I believe Mr. McKenna is a credible witness. While respondent produced other witnesses whose recollection was different as to this aspect of the meeting, I disbelieve those witnesses because of their bias, lack of recollection, or general appearance.

Conspiracy

Respondent has combined and conspired[19] with certificated air carriers to publish the schedules of the noncertificated carriers in the OAG in a discriminatory manner. [41]

This conspiracy injured the noncertificated carriers and had the purpose and effect of a *per se* illegal group boycott. Two analogous cases make the point, *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), involved a vertical conspiracy among manufacturers, distributors and Broadway-Hale, a retailer of household appliances, whereby the sellers agreed not to sell to the retailer's competitor, Klors, or to sell to it only at discriminatory prices and unfavorable terms. (359 U.S. at 213) Broadway-Hale "used its 'monopolistic' buying power to bring about this situation." (359 U.S. at 209) The Court held the conspiracy to be a group boycott and *per se* illegal, and that such group boycotts have not been "saved by allegations that they were reasonable in the specific circumstances" because "such agreements no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." (359 U.S. at 212)

The commuter carriers here have received discriminatory treatment because of a conspiracy between their competitors, the certificated carriers, and respondent. In *Broadway-Hale*, Klors received discriminatory treatment as the result of a conspiracy between its competitor, Broadway-Hale, and the suppliers. Both show *per se* illegal group boycotts.

In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); two Texas broker-dealers arranged with members of the New York Stock Exchange for direct-wire telephone connections used for trading securities over the counter. This private wire connection facilitated communication with other traders by [42]providing instantaneous market information about the latest offers to buy and sell. The temporary approval was rescinded pursuant to the rules of the Exchange. The Court held this to be a *per se* violation of the Sherman Act since it was a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market. The member firms remained willing to deal with the petitioners for the purchase and sale of securities, but the Court held that this did not excuse the collective decision to deny petitioners the private wire connections: "A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act." (373 U.S. at 348–49 n. 5)

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[19] The complaint and notice of contemplated relief herein involve, in part, allegations of an unlawful combination between respondent and certificated air carriers (see paragraphs 11, 15 and 18 of the complaint; paragraph 1(c) of the notice of contemplated relief; Tr. 49-53). The complaint does not contain the word "conspiracy." As used in the language of antitrust law, the terms "conspiracy" and "combination" are derived from the Sherman Act which, in part, prohibits every "contract, combination . . . or conspiracy in restraint of trade," 15 U.S.C. 1. The gist of both terms is "whether or not there is a collaborative element present." *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F. Supp. 945, 951 (S.D. Tex. 1972). It has been suggested that the terms are synonymous. *Id.* at 950 n. 1. Since there is a presumption against the use of redundant words in a statute, *FTC* v. *Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975), the terms probably have slightly different meanings. It may be that an unlawful "combination" can be established by evidence falling somewhat short of that necessary to establish an unlawful "conspiracy." Oppenheim, Federal Antitrust Laws, p. 178 n. 1 (3rd Ed. 1968).

Respondent here provides the airline industry with the OAG. In *Silver*, the New York Stock Exchange provided the direct wire telephone connections. Commuter carriers can do business — though not as well — without fair treatment in the OAG's publication policy. In *Silver*, the Texas broker-dealers could conduct business without the direct wire service. The illegality springs from the collective denial of a valuable marketing tool.

Abuse of Economic Power

In addition to the unlawful combination, the complaint charges that the OAG is the only publication in the United States that has all of the passenger flight schedules of air carriers, and that respondent has abused its duty to treat in a nondiscriminatory manner all of those who rely on that service.

The complaint does not allege unlawful monopolization in the publication and sale of passenger flight schedules of domestic air carriers, nor does it allege unlawful effects on companies other than air carriers. No injury is alleged to potential or actual competitors of respondent in the publication and sale of passenger flight schedules of domestic air carriers.[20] Instead, the theory of competitive injury is that respondent has misused the OAG to discriminate against noncertificated air carriers.

The classic misuse of economic power has the purpose and effect of injuring competition in the market in which the [43]law violator is engaged.[21] Here, by contrast, the theory of the individual violation of Section 5 involves respondent's misuse (by discriminatory publishing policies) of economic power (the OAG) to the detriment of noncertificated air carriers—a market in which respondent does not compete.

The competitive injury of this theory, then, involves the use of economic power in one market with the effect of curtailing competition in another market. This theory has precedent. In *Atlantic*

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[20] Stipulation filed September 24, 1976.

[21] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 (1973); *United States* v. *Griffith*, 334 U.S. 100, 109 (1948).

Refining Co. v. *FTC,* 381 U.S. 357 (1965), the Court upheld a Commission order prohibiting a similar misuse of economic power. There, the oil company agreed to "sponsor" Goodyear tires, batteries and accessories ("TBA") to independent gasoline stations to which it sold gasoline. In return for this sponsorship the oil company was paid a commission on the TBA Goodyear sold to the gasoline station. Among the sources of "leverage" in Atlantic's hands, by which it influenced the buying decisions of the Atlantic gas station dealers, were its lease and equipment loan contracts with short term and cancellation provisions. (381 U.S. at 368) The TBA sold to the Atlantic gasoline stations was the market foreclosed by the arrangement. Atlantic used its economic power over the gas stations and injured competition in a market in which it did not compete. Similarly, here, respondent uses its economic power — control of the OAG — and injures competition in a market in which it does not compete — air passenger transportation.

La Peyre v. *FTC,* 366 F.2d 117 (5th Cir. 1966) is another analogous case. There the circuit court upheld a Commission order prohibiting, under Section 5, the leasing to shrimp canners of a patented shrimp peeling machine on a discriminatory basis. Respondents there were engaged in shrimp canning and leased the shrimp peeler to West Coast shrimp canners at twice the rate it charged Gulf Coast canners. The court upheld the finding that this was the use of monopoly power in one market (the patented shrimp peeler) resulting in discrimination and the curtailing of competition in another market (shrimp canning). (366 F.2d at 121)

Respondent here has also used its economic power in one market to discriminate and injure competition in another market. [44]

Relevant Market

There was no dispute in this record that the geographic market is the United States. (Complaint ¶4; Answer ¶4) The parties vigorously contest, however, the relevant product market.

In *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962), the Court stated the relevant product market test under Section 7 of the Clayton Act:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

The Court then described the criteria to be applied in determining the existence of a submarket, *ibid:*

The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

This test for submarket criteria may appropriately be used to define the relevant product market in a case under Section 5 involving abuse of economic power by control of a market. *Borden, Inc.*, Vol. 3 Trade Reg. Rep. ¶21,490, p. 21,498 (FTC Final Order, Nov. 7, 1978 [92 F.T.C. 669]).

Respondent argued that there are four services available to users of the OAG which compete with it: (1) advertising—radio, television and newspaper, (2) individual airline schedules, (3) computerized schedule information, and (4) the ABC World Airline Guide. [45]

Computerized schedule information comes the closest to competing with the OAG. This system involves a computer tape of schedule information and is used generally by one of the certificated airlines. The information is displayed at the counter of the ticket agent on a cathode ray tube. The tapes contain only the schedule information ordered by the airline and do not contain all of the flight schedule information available in the OAG. (Finding 46) The system is much more expensive than the OAG. (Finding 43) Only a small percentage of those needing access to flight schedule information have a computer system. (Finding 42) Even those who have a computer system still subscribe to the OAG. (Finding 45) The growing use of the CRTs by airline reservation agents has not diminished the growth of the sales of the OAG. (Finding 44)

The submarket analysis of *Brown Shoe* shows that the OAG is a distinct economic market. Neither computerized schedule information nor the other services are reasonable substitutes for the information published in the OAG.

1. Industry Recognition

Industry witnesses testified that they do not recognize as a substitute for the OAG advertising of flight schedules on the radio, television or print media (Finding 51), individual airline timetables (Findings 47, 49), computerized information (Finding 42), or the ABC World Airline Guide (Findings 39, 40). Even respondent's former Executive Vice President testified that there are no significant competitors of the OAG. (Finding 36) It is recognized in the airline industry as the primary marketing tool for air carriers and is referred to as the "Bible." (Finding 35)

2. Unique Characteristics

The OAG is the only complete listing of all scheduled flights in North America. Its cover proclaims that it is the "Standard Reference of the Air Traffic Conference of America," which is the trade association for certificated air carriers. (Finding 35) Advertising, individual airline timetables and computerized information do not have the massive detail available in the OAG. (Findings 45–47) [46]

The ABC World Airline Guide provides different information. (Finding 37) Where these services are used, they supplement the OAG, not substitute for it. (Findings 45, 51)

3. Price

There are substantial price differences between the OAG and the purported substitutes. Computerized information and individual timetables are vastly more expensive. (Findings 43, 48) Commuter carriers cannot afford to advertise outside of the areas in which they fly. Advertising is not a financially viable alternative to the OAG. (Finding 50)

The OAG is also the relevant market using the traditional market definition of monopolization case law.

The ultimate objective of the market analysis is to deliniate a market which conforms to an area of effective competition and to the realities of competitive practices. *L.G. Balfour* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1971). A single product may be a relevant market. In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572–73 (1966) (*dicta*) the Court said that in monopolization cases under Section 2 of the Sherman Act, as in Section 7 cases under the Clayton Act, "there may be submarkets that are separate economic entities."[22] [47]

Where, as here, a conspiracy is found, the relevant product market may be narrow indeed. *International Boxing Club of New York* v. *United States*, 358 U.S. 242 (1959) (championship boxing matches); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) (the replacement market for taxicabs in four cities); *United States* v. *Pullman*, 50 F. Supp. 123 (E.D. Pa. 1943) (furnishing and servicing sleeping cars for railroads); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N.D. Ohio 1913) (tugboats in 14.of the 50 Great Lakes harbors). The market alternatives argument is irrelevant where, as here, there was a conspiracy to boycott. In *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir. 1952), the plaintiff wholesaler of fresh fruit and vegetables had been denied renewal of a lease in a building used as a market:

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[22] Market deliniation under Section 5 of the Federal Trade Commission Act may be even less formal than under the Sherman or Clayton Acts. *Cf. FTC* v. *Brown Shoe Co.*, 384 U. S. 316, 320–22 (1966).

> Defendants contend . . . that a discriminatory policy in regard to the lessees in the Produce Building can never amount to monopoly because other alternative selling sites are available. The short answer to this is that a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization.

The OAG is a flight schedule information service for which there is no substitute. Respondent has conspired to discriminate in the publishing of information in the OAG to the detriment of noncertificated air carriers and the travelling public. The OAG is, therefore, the relevant product market in this case. [48]

Intent

Respondent argues that its publishing policy was intended only to insure the "integrity" of the OAG, and that it separates the classes of air carriers to avoid misleading the public. In fact, however, respondent has a substantial financial incentive to follow the will of the certificated carriers. This economic incentive distinguishes respondent's intent from the altruistic intent exonerating collective action.

The classic rule is that proof of specific intent in a monopolization case is not always required. *United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948). The use of economic power may not be unlawful, however, if it is for an altruistic purpose.[23] Respondent's purpose therefore must be considered in deciding the individual conduct theory of the complaint.

Complaint counsel argue that "regardless of motive" it is the duty of a monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. (Brief p. 105) Complaint

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[23] Absence of anticompetitive motive may exonerate monopolistic or group conduct. *Joseph E. Seagram & Sons* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062. See also:

> *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). (A committee of certificated air carriers refused to list McQuade's tours in its tour program manual. The court refused to apply the *per se* test of collective refusals to deal because those arrangements have the purpose or effect of excluding or coercing competitors and here none of the members of the committee were in competition with McQuade and there was no evidence to suggest that the committee "applied its standards to McQuade in a discriminatory fashion." (467 F.2d at 187-88)).
>
> *Bridge Corp. of America* v. *America Contract Bridge League, Inc.* 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971). (Defendants' purpose was not to injure plaintiff but to protect the integrity of bridge tournaments.)
>
> *Deesen* v. *The Professional Golfers' Ass'n.*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (PGA's standards needed to prevent tournaments from being bogged down by great numbers of players of inferior ability.)
>
> *Staff Research Associates, Inc.* v. *Tribune Co.*, 346 F.2d 372 (7th Cir. 1965) (Newspaper refused to allow employment agencies to advertise under "help wanted" section of classified ads but allowed ads under "help wanted - employment services.")
>
> *America's Best Cinema Corp.* v. *Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972), (Newspapers restricted X-rated movie ads to the name and telephone number of the theater.)

[49]counsel cite for this proposition *La Peyre, supra*. There the Commission's majority opinion held that, by discriminatory leasing of the shrimp peeling machines, respondents were injuring their own competitors since they also were engaged in shrimp canning. Commissioner Elman, in a separate opinion, stated that respondents were not discriminating in price to protect their interests as shrimp canners but rather to maximize their profits on the shrimp peeling machines. The Circuit Court held that under either finding[24] of motive respondents violated Section 5 (366 F.2d at 121). [50]However, Commissioner Elman's theory of the motivation does not disregard intent as an element of a Section 5 violation. He specifically stated that respondents' conduct "substantially and *unjustifiably* injured competition in the shrimp canning industry." (65 F.T.C. 799, 869 (1964) (Emphasis added.)) This reasoning leaves room for any altruistic purpose which might make a monopolist's conduct justifiable. *La Peyre* does not hold that motive is irrelevant to a Section 5 monopoly case.

As found herein, however, respondent conspired with the certificated carriers to discriminate against the noncertificated carriers, and even without an overt conspiracy respondent had a great economic incentive to please its largest customers whose cooperation makes possible the publishing of the OAG.[25] This motivation surely does not justify the unlawful acts by respondent.

Injury to Competition

Commuter airlines carry passengers in numerous city pairs also served by certificated carriers (Findings 67–70). While they generally fly smaller planes (Finding 71), commuters in some markets fly equivalent or even superior planes to those used by certificated carriers or foreign and replacement carriers listed with certificated carriers in the OAG. (Findings 72–76)

Commuters competing with certificated carriers are sometimes able to win substantial market share by more frequent schedules. (Finding 78) For example, a commuter carried 92% of the 140,000 passengers flying between Los Angeles and Ontario, California in 1973 (CX 61E), by scheduling 30 daily flights while the certificated carriers had five. (CX 174 p. 335)

Commuter carriers flying city pairs served by certificated carriers set their fares based on the fares charged by certificated carriers flying the same city pairs. Those certificated carriers also react to fares charged by commuters. Such pricing decisions indicate competition. *United States* v. *duPont*, 351 U.S. 377, 400 (1956) [51]

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[24] The Circuit Court erred in stating that: "We need not resolve these contrary findings as to motive." The court was bound to accept the majority Commission finding of the Commission as to motive, if it was based on substantial evidence. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487–88 (1951).

[25] (Nelson 2461)

Intrastate carriers often serve the same city pairs as certificated carriers. (Finding 93) They fly the same type of airplanes. (Finding 94) There is no doubt that intrastate and certificated carriers compete.[26] (Findings 95–96)

Since 1962 when it acquired the OAG, respondent has published schedule information showing connecting flights for certificated carriers. (Findings 20, 22, 112) Respondent also published connections for replacement flights and for foreign air carriers during that time. (Findings 26, 29, 108, 109) Until December 1, 1976, and after the Federal Trade Commission started the investigation which led to the complaint in this case, respondent refused to publish free or paid connections for commuter air carriers. (Findings 14, 15, 102, 112)

Commuters rely heavily on passengers who are connecting to or from certificated airlines. (Finding 107) When connecting flight information is not listed in the OAG, the availability of that service is often not known to those booking flights. (Finding 106)

Respondent's failure to publish connections for commuter air carriers was a discriminatory abuse of economic power and caused injury to commuters and to the travelling public. (Findings 107–109) After the OAG started publishing commuter connections, commuters received a substantial increase in connecting passengers. (Finding 110) Commuters also started buying a substantial number of paid connections in the OAG. For example, after the respondent finally allowed commuters' connections to be published, one commuter bought about 3,200 paid connections in the OAG monthly at $2.30 per connection. (Whiteside 416)

The OAG has for many years published schedules in separate categories for certificated, intrastate and commuter air carriers, with the certificated carrier schedule always being listed first. (Findings 20–24) Within each category, the flights are listed chronologically. (Finding 21) Foreign carriers are listed in the OAG with certificated carriers. (Findings 25–27) Most commuter carriers which have [52] entered replacement agreements with certificated carriers are listed in the OAG with certificated carriers. (Findings 28–34)

Users of the OAG, reading from the top down, typically select the first acceptable flight listed in the OAG for the city pair. This means that the choice of a flight is usually made before the user of the OAG reaches the categories for commuter or intrastate carriers. (Finding

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[26] In the few months since the Airline Deregulation Act of 1978, almost all of the larger intrastate carriers have become certificated carriers. (Finding 97) Such interchangeability clearly demonstrates an area of effective competition. *United States* v. *Continental Can Co.*, 378 U.S. 441, 456–57 (1964)

114) Even experienced users of the OAG overlook commuter listings. (Fugere 232–34)

Respondent performed a study for American Airlines and found that: "[w]hen American salesmen use the OAG they are prone to quote the first service displayed—even though it is competitive to American. (CX 52Z20) In selling its customer guide respondent refers to being listed first as presenting "the host carrier's service in the most advantageous manner." (CX 52D; CX 122) The OAG refers to being listed first as "preferential display of schedules." (CX 52Z)

Prior to 1971 carriers were listed alphabetically when flights had identical departure and arrival times. A TWA official, M.A. Brenner,[27] felt that this created an unfair advantage for carriers whose codes began with letters at the beginning of the alphabet. (CX 43) When this was brought to their attention at an Airlines Guides Committee meeting, the certificated airlines whose codes were toward the beginning of the alphabet opposed the change; those whose codes were toward the end of the alphabet were in favor of randomizing such listings. (CX 118)

Being listed below certificated carriers in the OAG's flight listings resulted in injury to noncertificated carriers. (Finding 115) One commuter carrier representative testified that he would pay $100,000 to be treated in the same manner as competing foreign air carriers which are listed as certificated air carriers (Ceresa 1014) A witness from a certificated carrier called by respondent testified that in the Dallas-Albuquerque market, up to 20 passengers per flight are gained by first listing. (Kyzar 1617) [53]

Injury to the Public

The complaint alleges that the effects of respondent's OAG publication policies have been, in part, "to suggest and/or advise the public that direct flights of certificated air carriers are to be given preference over those of intra-state and commuter air carriers." (Paragraph 16) The complaint further alleges that respondent's acts and these effects constitute a violation of Section 5. (Paragraph 18) While injury to the noncertificated carriers was the main part of complaint counsel's case, this allegation of injury to the consumers was also sustained.

When commuter connections were not published in the OAG, travel agents and airline booking agents often did not know of the existence of the commuter flight and therefore did not inform passengers who would wait for a certificated connection, sometimes losing an extra business day in doing so. (CX 20E, CX 113 p. 817) If no certificated flight was available, the passengers would rent cars to go to their final destinations. (CX 189C) Passengers were overcharged because the ticket agents were not aware of the discount available through joint fares available in many markets. (CX 107 p. 14 n.1)

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[27] One of respondent's expert witnesses described Mr. Brenner as the "world's leading authority on airline schedules." (Cooke 3334–35)

Respondent's policy of separate listings also injures the traveling public who may take more expensive, and inconvenient flights with certificated airlines merely because they were not informed of the commuter flight. (Finding 115; Autry 702–03)

Respondent's discriminatory practices in the publication of the OAG evolve from its close business relationship to, and financial dependence on, the certificated air carriers. (Findings 64–66, 103) With this motivation, respondent cannot use its economic power ethically to inflict injury on consumers, regardless of whether competition has been injured. This conduct is morally objectionable and detrimental to consumers and violates Section 5 of the Federal Trade Commission Act. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n. 5 (1972).

Jurisdiction

Section 5 exempts from Commission jurisdiction "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958." 15 U.S.C. 45(a)(2). [54]Respondent is not an air carrier.[28] The competitive injury here, however, is to air carriers, and respondent argues that the exemption is for the business of air transportation and not for the status of being an air carrier. In *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), the court held that the similar exemption in Section 5 for common carriers subject to the Interstate Commerce Act was in terms of status and not business activities. (549 F.2d at 455) The court pointed out that, in contrast, Congress exempted the business activities—and not the status—of those subject to the Packers and Stockyards Act.[29] (549 F.2d at 455–56)

Principles of statutory construction show that the exemption should be limited solely to air carriers. The FTC Act is remedial legislation. *Sears, Roebuck & Co.* v. *FTC*, 258 Fed. 307, 311 (7th Cir. 1919). As such, it should be construed broadly so as to effectuate its purpose. *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). The exception to a broad grant of authority is to be narrowly construed. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961). The "burden of proving justification or exemption under a special exception to the prohibition of a statute generally rests on one claiming its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

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[28] Respondent admitted that: "Donnelley is not an air carrier or an indirect air carrier. . . ." Attachment A, p. 2, Answer to Motion of Respondent to Dismiss the Complaint for Lack of Jurisdiction, filed herein on September 1, 1976.

[29] The Packers and Stockyards Act exemption to Section 5 is only for "persons, partnerships, or corporations insofar as they are subject to" the Act. 15 U.S.C. 45(a)(2).

In *Branch* v. *FTC*, 141 F.2d 31 (7th Cir. 1944), the United States Court of Appeals for the Seventh Circuit recognized these principles. The Commission there found a correspondence school had violated Section 5 by unfair practices in the sale of text books to students residing in Latin America. The school argued that it was exempt from Commission jurisdiction since it was engaged in foreign commerce. The court upheld the Commission's jurisdiction, stating (114 F.2d at 36):

> This is a remedial statute implementing national policy. By it Congress is seeking to free foreign commerce of unfair trade practices, just as it has attempted to free [55] commerce between the States from such practices. We cannot assume that Congress intended to free only some of its foreign commerce from unfair trade practices. We are bound to give to the generic words used by Congress just as liberal a construction as the words are capable of in order to prevent such a partial protection to foreign commerce.

Similarly, Section 5 should be given a broad construction and the exemption for air carriers should not be extended to protect the unfair practices of respondent.

Congress has created no express exemption from FTC jurisdiction for the acts of respondent. *Cf.*, *Perpetual Federal Savings & Loan Ass'n*, FTC Dkt. 9083, Vol. 3 Trade Reg. Rep. ¶ 21,371, at p. 21,291 (1977) [90 F.T.C. 608]. Nor has there been an implied exemption to the strong national policy expressed in the Federal Trade Commission Act.[30] CAB regulation is not so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest. This case does not conflict with CAB regulation of air carriers.[31] Furthermore, the CAB has not exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation.[32] [56]

As noted above, in the memorandum opinion issued October 31, 1977, Judge Bernard M. Decker of the United States District Court for the Northern District of Illinois decided that the FTC lacks jurisdiction of this matter. *Reuben H. Donnelley Corp.* v. *FTC*, 1977–2 Trade Cases ¶

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[30] The test for implied immunity is stated in *United States* v. *AT&T Co.*, 1978–2 Trade Cases ¶ 62,247 at p. 75,547 (D.D.C. 1978).

[31] In an amicus letter filed herein on February 7, 1977, the General Counsel of the CAB stated that: ". . . [T]he Board does not believe that its own jurisdiction over air carrier competition would be compromised if the Federal Trade Commission Act were construed to give the Commission subject matter jurisdiction in this case." Pursuant to the Airline Deregulation Act of 1978, much of whatever authority of the CAB has had, including § 414 of the Federal Aviation Act, 49 U.S.C. 1384 (providing antitrust immunity) is transferred to the Department of Justice or abolished over the next few years. Pub. Law 95–504, Section 1601 (Oct. 24, 1978).

[32] While the agreements creating the Air Traffic Conference Committee have been filed with the CAB, the discriminatory publishing practices at issue in this case have not received CAB approval. In fact, the certificated carriers could not receive such approval because the agreements specifically exempted from the authority of the committee any subject affecting competitors. (RX 283A, Z–4, Z–7)

61,721. I respectfully decline to follow Judge Decker's analysis, for the above reasons and for those in the order denying the motion to dismiss, issued herein on March 30, 1977.

First Amendment

The order issued here requires respondent to publish schedules of commuter and intrastate air carriers on the same terms and conditions as it publishes schedules of certificated carriers. This would require Donnelley to publish the OAG in a format that differs from its present format. Respondent argues that this requirement constitutes impermissible censorship of the press in violation of the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[33]

Recent decisions of the Supreme Court have accorded some measure of First Amendment protection to commercial speech. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The Court has not raised commercial speech on the same level of protection as noncommercial speech. *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978). Furthermore, the Court has reaffirmed the necessity of regulating false deceptive or misleading speech. *Virginia Board*, 425 U.S. at 771–72. ("The First Amendment . . . does not prohibit the state from insuring that the stream of commercial information flows clearly as well as freely. . . .")

The Court has made it clear that the press is not exempt from the antitrust laws. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945):

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to [57]protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

In *Lorain Journal* v. *United States*, 342 U.S. 143 (1951) the Court held that a newspaper had violated Section 2 of the Sherman Act and upheld an injunction preventing a newspaper, *inter alia*, from "refusing to publish any advertisement . . . or discriminating as to . . . arrangement, location . . . or any other terms or conditions of publication of advertisement or advertisements where the reason for such refusal or discrimination is in whole or in part, express or implied, that the person or corporation submitting the advertisement or advertisements has advertised . . . in or through any other advertising medium." (342 U.S. at 157) The Court held that the injunction was not a "restriction upon any guaranteed freedom of the press." (342 U.S. at 155)

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[33] That the OAG is a directory and not a newspaper does not limit First Amendment protection. *Princeton Community Phone Book, Inc.* v. *Bate*, 582 F.2d 706, 710–11 (3rd Cir. 1978).

These cases clearly support the constitutionality of the order issued here, and show that the First Amendment is not abridged. [58]

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, The Reuben H. Donnelley Corporation.

2. The acts and practices charged in the complaint took place in commerce, or affect commerce, within the meaning of the Federal Trade Commission Act.

3. There is no effective substitute for the OAG for scheduled air carriers wishing to disseminate flight information or for the consuming public wishing to obtain flight information.

4. While engaged in the sale and distribution of the OAG, respondent individually, and in combination with other companies, has unfairly discriminated in its listing policies for commuter and intrastate air carriers in the following ways:

(a) For many years and until December 1, 1976, respondent refused to publish connecting flights for commuter air carriers while at the same time publishing connecting flights for certificated air carriers and others in competition with those commuter air carriers; and

(b) For many years respondent has refused and continues to refuse to display commuter and intrastate air carrier flights chronologically with certificated air carrier flights and others.

5. The effects of respondent's discriminatory policies have been to injure: (a) commuter and intrastate air carriers which have lost business as a result of such policies; and (b) the public who have been unaware of the services of commuter and intrastate air carriers as a result of such policies.

6. Respondent's unfair methods of competition and unfair acts in commerce violate Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). [59]

REMEDY

Respondent must be ordered to cease and desist the unfair practices described herein.

Respondent argues that, even assuming that its refusal to publish connections for noncertificated carriers violated Section 5, it has been publishing this information since December 1, 1976, and there is no evidence to show that it might revert to that practice if a cease and desist order is not issued. Contrary to respondent's assertion, there is evidence that but for this proceeding respondent might resume its former policy. There is evidence that the conspiracy proved in this case could easily be resumed. The representatives of the certificated airlines agreed to continue to meet with the OAG in an unofficial capacity. (CX 67) Further, respondent continues to discriminate against commuters by refusing to merge the schedules. (Finding 24) There exists some cognizable danger of recurrent violation. *SCM Corp.* v. *FTC*, 565 F.2d 807, 813 (2d Cir. 1977).

Respondent changed its policy only after, *and because*, the Federal Trade Commission started the investigation which led to the issuance of the complaint in this case. (Finding 112; Reich 1273–74; Woodward 4170–71) Stopping a practice after the government investigation starts does not show permanent abandonment. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47–48 (1960); *Cotherman* v. *FTC*, 417 F.2d 587, 594–95 (5th Cir. 1969); *Coro, Inc.* v. *FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Giant Food, Inc.* v. *FTC*, 322 F.2d 977, 986–87 (D.C. Cir. 1963). ". . . [N]o assurance is in sight that [respondent], if it could shake [the Commission's] hand from its shoulder, would not continue its former course." *Sears, Roebuck & Co.* v. *FTC*, 258 Fed. 307, 310 (7th Cir. 1919).

Although not raised as a defense, respondent has transferred responsibility for the publication of the OAG, effective January 1, 1979, to a related corporation. (Finding 16) The cease and desist order should, nevertheless, be directed at respondent. *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 271 (6th Cir. 1970). The question whether Official Airline Guides, Inc., is the successor to respondent, and therefore liable under the order, can be determined in a compliance proceeding. *Id.* at 272. [60]

ORDER

I

For the purpose of this order, the following definitions shall apply:

A. "OAG" refers to the Official Airline Guide - North American Edition.

B. "Certificated air carrier" refers to an air carrier that holds a certificate of public convenience and necessity issued by the United States Civil Aeronautics Board ("CAB") authorizing it to fly its routes.

C. "Commuter air carrier" refers to an air carrier which flys pursuant to an exemption set forth in Part 298 of the CAB's regulations.

D. "Intrastate air carrier" refers to an air carrier which operates solely within a state of the United States pursuant to the authority of the Federal Aviation Administration and state regulation and which performs scheduled flight service, but which does not hold a certificate of public convenience and necessity or foreign air carrier permit issued by the CAB.

II

It is ordered, That respondent, The Reuben H. Donnelley Corporation; its parent; subsidiaries; any concern controlled by respondent, including joint ventures; its successors and assigns; and its officers, agents, representatives, employees, [61]directly or indirectly, through any corporate or other device, individually or in combination, in the publication of flight listings in the OAG or successor publications shall forthwith cease and desist:

1. From discriminating among the flight listings of commuter air carriers, intrastate air carriers and those of certificated air carriers in the order of listing of those carriers in any city pair in the OAG.

2. From discriminating among the flight listings of commuter air carriers, intrastate air carriers and those of certificated air carriers in the opportunity offered those carriers to receive free connection listings or to purchase paid connection listings in the OAG.

3. Nothing in Paragraphs 1 and 2 of this order shall prohibit respondent from designating certificated, intrastate and commuter air carriers by appropriate symbols.

III

It is further ordered, That respondent (as that term is used in Section II) shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or its successors or assigns which may affect compliance obligations arising out of the order, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of the parent, subsidiaries or joint ventures of respondent. [62]

IV

It is further ordered, That within sixty (60) days from the date of service of this order, and on a periodic basis thereafter, respondent (as that term is used in Section II) shall submit, in writing, to the Federal Trade Commission reports setting forth in detail the manner and form in which respondent is meeting its compliance obligations.

OPINION OF THE COMMISSION

BY PITOFSKY, *Commissioner*:

I. INTRODUCTION

In April 1976 the Federal Trade Commission issued a complaint charging The Reuben H. Donnelley Corporation ("Donnelley") with violations of Section 5 of the FTC Act, 15 U.S.C. 45. Donnelley, a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., is engaged, among other things, in publishing and distributing various publications relating to travel and transportation. The practices challenged in the complaint involve a Donnelley publication called the Official Airline Guide-North American Edition (the "OAG"). The OAG combines into one directory the flight schedules and fares of all scheduled air passenger transportation in the United States, Mexico, Canada and the Caribbean. The complaint focuses on the different treatment accorded in the OAG to the three different classes of United States air carriers furnishing scheduled air passenger transportation.

The three different classes of domestic air carriers are certificated carriers, commuter carriers, and intrastate carriers. Certificated carriers operate pursuant to "certificates of convenience and necessity" issued by the Civil Aeronautics Board (the "CAB"). One consequence of obtaining such a certificate is being subjected to extensive regulation by the CAB, especially with regard to routes and fares. Certificated carriers are authorized to fly large [2]jet aircraft, and, pursuant to route authority given them by the CAB, they provide service between the major cities of the nation, as well as between some smaller cities. Generally speaking, the large, well-known airlines in this country—such as American, TWA, etc.—are certificated carriers.

Commuter carriers do not obtain certificates of convenience and necessity from the CAB, and they operate free of most of the regulations applied to certificated carriers. They are not required to apply to the CAB for route authority, which means that they can provide air service between whatever cities they choose. Many of the routes they fly are between two smaller, outlying communities, or between a smaller community and a major city. Commuter carriers typically provide scheduled service between cities which are relatively close, with the average route being only seventy-five miles. The main reason for this is that CAB regulations require commuter carriers to use aircraft which are much smaller than those typically used by certificated carriers.

Like commuter carriers, intra-state carriers do not obtain certificates of convenience and necessity from the CAB. They operate solely within a state and do not engage in interstate air transportation. They are regulated solely by the individual states within which they operate. There are a handful of intra-state carriers operating in Florida, Texas, California, Illinois and Alaska.

Complaint counsel alleged in the hearings below that certain aspects of the manner in which Donnelley lists or has listed flight schedule information in the OAG favor certificated carriers over non-certificated carriers and result in serious competitive injury to non-certificated carriers. Responding to their arguments, the presiding administrative law judge (the "ALJ") held that the challenged listing practices violate Section 5 on two different grounds: (1) Donnelley has maintained them as the result of an illegal agreement between it and certain certificated carriers; and (2) Donnelley is a monopolist in the providing of flight schedule information, and as such it has a duty not to arbitrarily place one class of carriers at a significant disadvantage *vis a vis* a competing class of carriers. This second ground raises a policy issue which has perplexed antitrust *cognoscenti* for decades—whether antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, but which are arbitrary and result in competitive injury to customers, suppliers, or others vulnerable to its monopoly power. We reverse the ALJ's holding that Donnelley entered into an illegal agreement, and we reverse in part and affirm in part his holding regarding Donnelley's duty as a monopolist. [3]

II. FACTS

A. *The OAG.*

According to Donnelley, the OAG "[c]ombines the flights of all scheduled airlines in [the] U.S., Mexico, Canada and the Caribbean into one convenient source." CX 113.[1] In fact, it is the only complete listing of scheduled flights in North America. As such, the OAG is the main source of flight schedule information for the flying public and a primary marketing tool for air carriers.

The December 15, 1978 issue of the OAG runs to over 1500 pages and contains thousands of flight listings. RX 571. A full annual subscription, which entitles the purchaser to two updated editions per month, was selling in December 1978 for $98.44. In June 1975 the OAG had a total circulation of over 169,000, and in November 1978 the total circulation of the first-of-the-month issue was 208,000. Most of the OAG's circulation goes to air carriers, travel agents, and businesses (which typically use it in connection with work-related travel by employees).

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[1] Complaint counsel's exhibits have been labeled "CX" and respondent's exhibits "RX".

The predecessor publication to the OAG was published at least as early as 1943, under the title "Universal Airline Schedules". Donnelley acquired the OAG from its then-publisher in 1962. From its inception until 1958 the OAG simply reproduced the timetables of each scheduled air carrier which submitted this information for publication. In 1958 the OAG commenced publication of the "Quick Reference Edition", which embraced a new format still in use today—the "to-city" format. In the "to-city" format, all cities *to which* there is scheduled air carrier passenger service are listed in alphabetical order, each representing a destination point. Beneath the listing for each of these cities, all the cities *from which* there is scheduled air carrier passenger service to the destination city are listed in alphabetical order. Under each "from" city are listed all the flights departing there and arriving in the particular "to" city, with information about departure time, arrival time, fare, type of aircraft, name of airline, etc. [4]

From the time it purchased the OAG until after the complaint in this case was filed, Donnelley listed all the flights under each "from" city in separate groupings reflecting the class of carrier involved—certificated, commuter, or intra-state—and whether the flight was "direct" or "connecting".[2] The greatest number of categories listed under any "from" city was four. The categories and the sequence in which they were listed was as follows:

1. Certificated carrier direct flights (published with no heading).
2. Certificated carrier connecting flights (published under the heading "Connections").
3. Intra-state carrier direct flights (published under the heading "Intra-State").
4. Commuter carrier direct flights (published under the heading "Commuters").[3]

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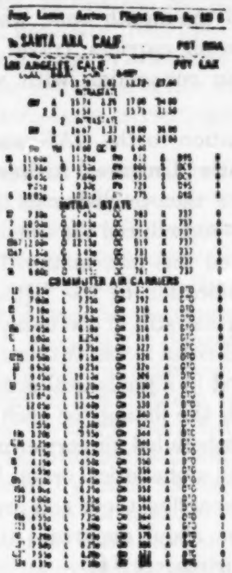
[2] A direct flight is a flight between two cities which does not involve a change of aircraft; a direct flight may be non-stop or there may be one or more stops. A connecting flight is two or more direct flights used in conjunction with each other to provide transportation between two cities; a connecting flight involves changing planes at some intermediate point between the point of origin and the final destination point.

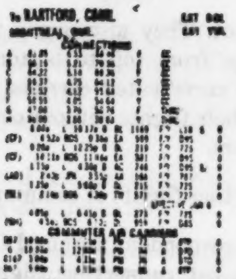
[3] These four categories of air carrier service were always published in the same sequence (or if one or more of the categories was not available between the city-pair involved, in the same sequence minus the category or categories not offered).

The following examples, excerpted from an old issue of the OAG, should make all this somewhat clearer. [5]



A person wishing to fly from Los Angeles, California to Santa Ana, California would turn to Santa Ana in the alphabetical listings of "to" cities, and then look for Los Angeles in the alphabetical listings of "from" cities under the Santa Ana heading. The first nine lines under the bold-faced "Los Angeles, Calif." have to do with fare information and are not flight listings. The next five lines, ending just above the bold-faced "Intra-State", are listings for certificated carrier direct flights; in this case the only certificated carrier flying between this city-pair is Hughes Airwest (denoted by the symbol RW in the fifth column). The seven lines under the bold-faced "Intra-State" are flight listings for the only intra-state carrier flying between the city-pair: Air California (shown by the symbol OC). Finally, in the lines below the heading "Commuter Air Carriers" are the listings for the flights by the only commuter air carrier flying this route: Golden West (shown by the symbol GW). There are no certificated carrier connecting flights shown here, which means there were no such flights from Los Angeles to Santa Ana at the time this issue of the OAG was published. [6]

The example below, listing flights to Hartford, Connecticut from Montreal, Canada, illustrates how the category of certificated carrier connecting flights fits into this format.



The fact that the first heading is "Connections" means there are no certificated carrier direct flights from Montreal to Hartford. Certificated carrier connecting flights are listed under the heading "Connections". The first eight lines under that heading contain fare information. In the lines below those, each two-line pair lists a connecting flight from Montreal to Hartford; all the air carriers involved in those flights are certificated carriers. Commuter carriers' direct flights are listed separately below, under the heading "Commuters". There would obviously be no intra-state carrier flights between these two cities.

B. *The Alleged Discriminatory Practices.*

Complaint counsel assert that two aspects of Donnelley's listing policy, as illustrated above, have unreasonably restrained competition between certificated carriers and non-certificated carriers. First, they point to the fact that no connecting flights are listed for commuter or intra-state carriers, even though both have such flights; they claim Donnelley's failure to list these flights in the OAG limited users' knowledge that such flights existed and thereby caused commuter and intra-state carriers to suffer [7]competitive injury.[4] Second, complaint counsel claim Donnelley has injured non-certificated carriers by listing the flights of the three classes of carriers in separate groupings in the OAG, with the certificated carriers' first. They argue that listing certificated carriers' flights before the other carriers' flights has led users to believe certificated carriers are preferable to the other two classes of carriers, and to choose the flights of certificated carriers over the flights of commuter and intra-state carriers in situations where they otherwise would not. They also argue that users of the OAG usually read the listings from top to bottom and choose the first convenient flight. Since certificated carriers' flights are listed first, many users pick one of their flights without even looking at the flights of non-certificated carriers.

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[4] Though complaint counsel assert on appeal that Donnelley's failure to list intra-state carriers' connecting flights has injured those carriers (Complaint Counsel's Answering Brief, at 19), Donnelley is correct when it says that the ALJ did not make such a finding (Respondent's Appeal Brief, at 51 n.45). In addition, the complaint makes no mention of intra-state carrier connections, alleging only that Donnelley "has refused to accept for publication any schedules of connecting flights of commuter air carriers" (Paragraph 18), and that the effect of this policy has been "to foreclose commuter air carriers from disseminating information as to available connecting flight schedules to the public" (Paragraph 16). Even though complaint counsel's Proposed Findings of Fact, at 40, do contain an assertion that Donnelley refused to list intra-state carriers' connecting flights in the OAG, there are no citations to the record which establish competitive injury to intra-state carriers. For these reasons, in the discussion that follows we discuss only commuter connecting flights.

1. Failure to list connecting flights of commuter carriers.

From before the time respondent acquired the OAG until December 1976, the OAG did not list connecting flights involving commuter carriers—that is, commuter flights which connected with either a certificated flight or another [8]commuter flight.[5] With no such information listed in the OAG, the only way a user could discover and purchase a commuter connecting flight was by "constructing a connection". This involves looking up two separate direct flights—one from the point of origin to some intermediate point, and one from that intermediate point to the desired destination—and putting them together so as to achieve the desired connection. To construct a connection, a user of the OAG must figure out for himself what cities in between the city of origin and the city of destination would be likely places to catch a connecting flight going to the city of destination. It was established at the hearing that constructing a connection is a difficult and time consuming process. *Initial Decision*, at page 30, Finding 104. The ALJ found that where the OAG does not list connecting flights between a city-pair, there is little chance that their availability will be known. *Id.* at Finding 106. It follows that if a certificated carrier's connecting flight is listed between a city-pair in the OAG and a commuter carrier's connecting flight is not, the certificated carrier has a significant competitive advantage.

Donnelley's publishing policy has always been that some connecting flights will be listed in the OAG free, depending on their convenience and frequency; all other connecting flight listings must be paid for by the carriers involved. By the amounts they have paid to obtain connecting flight listings in the OAG, certificated carriers have shown that they consider such listings to be an important competitive device. In 1975, Delta paid Donnelley over $160,000 to list connecting flights; TWA over $181,000; Braniff over $115,000; Allegheny over $280,000; Continental over $150,000; Northwest over $216,000; and United over

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[5] Donnelley changed the OAG's format in this regard in December 1976, eight months after the complaint in this proceeding issued. The changed format, still used today, lists six separate categories of air service (rather than the original four) in the following sequence: 1) certificated air carrier direct flights; 2) commuter air carrier direct flights; 3) intra-state air carrier direct flights; 4) connecting flights involving only certificated carriers; 5) connecting flights which involve only commuter carriers or both commuter carriers and certificated carriers; and 6) connecting flights which involve only intra-state carriers. *See* the discussion of the effect of that change on this proceeding at page 46, n.41 *infra*.

$300,000. Seventy percent of [9]commuter carriers' passengers are connecting to or from certificated carriers. *Id.* at Finding 107. Thus the failure to list connecting flight information for commuter carriers deprived them of a primary marketing tool with respect to a large portion of their business.

This view was confirmed in a petition filed with the CAB by that agency's Office of Consumer Advocate:

> When such scheduled services [commuters' connecting flights] are not listed in the OAG there is little chance that the availability of such services will be known outside the immediate geographical area. Carrier personnel and travel agents may not be directing the traveling public towards the use of such services simply because they (the carrier personnel and travel agents) are not aware of the existence of the commuters air service. The general public, which to a large extent must rely on such industry professionals in such matters, will not be able to take advantage of commuter services, and air travel to numerous destinations appears to be far less convenient than it may be in fact. CX 28.

The importance of connecting flight listings was also recognized by various Donnelley officials. For example, Donnelley's present Senior Vice-President in charge of the OAG, Mr. Woodward, wrote in 1975 that a "disservice is being done" to commuters by refusing to publish their connecting flight listings. CX 201; *see also* CX 12B; CX 19A.

On appeal, Donnelley has offered no justification at all for this policy. During the hearings, it was established that in 1972 Donnelley had conducted a study on how much it would cost to begin listing separate groupings of commuter carrier connecting flights and intrastate carrier connecting flights. This study revealed that it would cost approximately $6000. RX 16A. The memo recording these findings goes on to say that adding the two additional groupings of flights "would be extremely detrimental" to the OAG. *Id.* But it gives no reason why this should be so. And, indeed, there is no evidence that Donnelley's decision to add the new connecting flight listings in 1976 has been detrimental at all. [10]

2. Failure to combine the listings of certificated, commuter, and intra-state carriers.

Since 1969 or thereabouts, commuter and intra-state carriers have urged Donnelley to "merge" the direct flight schedule listings of certificated, commuter, and intra-state carriers into a single chronological listing for each city-pair. *Initial Decision*, at p. 31, Finding 113. Donnelley has refused to do so.

Complaint counsel claim Donnelley's practice of listing the flights of the three classes of carriers in three separate groupings, with certificated carriers first, gives certificated carriers a significant competitive advantage over the other two. They say this happens, in part, because listing the flights of certificated carriers before the flights of commuter and intra-state carriers suggests to the OAG's users that certificated flights are to be preferred over commuter or intra-state flights. But the main reason why Donnelley's separate listing policy has injured non-certificated carriers, we are told, is that users of the OAG read the flight listings from the top of the page to the bottom and pick the first flight leaving at a convenient time. Thus, since the flights of commuter and intra-state carriers are listed below those of certificated carriers, it is probable that a user will choose a certificated flight before he even gets to the flight listings for commuter and intra-state carriers.

The certificated carriers themselves have long recognized the advantage of having one's flights listed above those of competitors. Donnelley has always listed the flights of certificated carriers in chronological order. But prior to 1972, when different carriers' flights between a particular city-pair had identical departure and arrival times, the flights were listed according to the alphabetical order of the carriers offering them. Thus if an American Airlines flight and a United Airlines flight had identical departure-arrival times between a city-pair, the American flight would have been listed first. If the two flights had identical departure times but one arrived before the other, the one arriving first got first listing. This policy led to what was known as "jockeying" of flight times: carriers would change the departure time of a flight so as to leave one [11]minute before a competing carrier, or speed up the flight time so as to arrive one minute before.[6] *See Initial Decision*, at p. 33, Finding 121.

Some certificated carriers became increasingly dissatisfied with this alphabetizing policy and began to call for a policy of randomizing flights with similar departure-arrival times. TWA and United—both of which come toward the tail end of the alphabet—led the fight for this proposed change.[7] Finally, the Airline Guides Committee, which is part of the trade association of certificated carriers and which was in close contact with Donnelley officials regarding the content of the OAG,[8] placed a proposal to change to randomization on the agenda for its October 1971 meeting. At the meeting, Mr. Parrish (then the Publisher of the OAG) asked for a show of hands of carriers favoring randomization and carriers opposing it. The result was that Donnelley found itself on the horns of a dilemma, as the following notation of one certificated carrier's representative shows: [12]

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[6] One extreme example of jockeying occurred in 1971 between American and TWA, on flights departing Los Angeles at 9:00 A.M. for Boston. TWA's flight arrived at 5:13 P.M. while American's flight arrived at 5:15 P.M.; so the TWA flight got first listing. In June, American reduced its flight time by two minutes so that it arrived at 5:13 also; this meant American got first listing since flights were listed according to the alphabetical order of the carriers when they had identical departure-arrival times. In August, TWA had reduced its flight time so that it was arriving at 5:08 while American had only gotten down to 5:09; so TWA got first listing again. In September, American had further reduced its flight time so that it was arriving at 5:08 too; the tie went to American.

[7] TWA conducted a study of the matter and compiled a report, which stated: "First listing is a significant advantage. . . ." CX 961.

[8] Much more will be said regarding this committee in the discussion of the alleged conspiracy, at pages 29-35, *infra*.

> All carriers whose codes began with A–M opposed randomizing and all carriers except one whose codes began with N–Z favored randomizing. Northwest was the exception and this is easily understood since United is their prime competitor. CX 88A.

After considerable tugging and pulling by the A–M camp and the N–Z camp,[9] the OAG changed its policy in 1972 and started randomizing direct flight listings where the flights left at roughly the same time.[10] *Initial Decision*, at p. 33, Finding 119.

All of this leads us to conclude that listing the flights of certificated carriers in a separate grouping before the flights of commuter and intra-state carriers has put commuter and intra-state carriers at a competitive disadvantage.

3. Alleged justifications for the separate listing policy.

Of course, it does not follow that a listing policy which distinguishes between the three types of carriers is arbitrary, or flows from a bad motive. Donnelley vigorously defends its policy of separate groupings, claiming it is justified and even required. Donnelley argues that the [13]policy is based on the fact that each of the three classes of carriers has a different legal status—that is, each is subject to different laws and regulations—and provides a fundamentally different level of service. Separate grouping is therefore necessary, we are told, because Donnelley has a responsibility to make it as clear as possible what kind of air service is being offered.

Complaint counsel deny that the differences in the three classes of carriers are as extreme as Donnelley represents. And they claim that even if there are differences in the three classes of carriers so that it is necessary to put users of the OAG on notice as to what class of carrier they are choosing, the separate listing policy is unacceptable because it is exclusionary; a less restrictive alternative could be chosen—like listing all three classes of carriers' flights together and placing some symbol next to the commuter and intra-state carriers' listings.

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[9] Both groups suggested the OAG would suffer economic repercussions if they did not get their way. For example, a vice-president of American Airlines said in a letter to Parrish, "[T]he 'paid connection' program which brings in an additional amount of revenue to your corporation may be drastically curtailed or perhaps discontinued by a number of the carriers should this plan [randomization] materialize." CX 118. Meanwhile, an official of United Airlines met with Mr. Reich, who was then Senior Vice-President of Donnelley in charge of the OAG, and gave him a similar message. The United official described it as follows in a memo to his superior: "[Reich said] that TWA is convinced that it is at a disadvantage because of the alphabetical listing. I frankly told Bill [Reich] that we too are unhappy and, as a large customer of Reuben Donnelley, want them to know what our position is." CX 87.

[10] The OAG later randomized connections as well.

Complaint counsel also argue that even if one accepts the argument about the three classes of carriers providing different levels of service, Donnelley's separate listing policy does not put users of the OAG on notice as to the type of service they are choosing because Donnelley allows "commuter-type" foreign carriers and some "favored" commuter carriers to be listed with the certificated carriers.

These arguments raise close factual issues about the nature and degree of the differences between the three classes of carriers. They are subject to different statutory provisions and differing degrees of government regulation. Section 401(a) of the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. 1371(a), provides that no air carrier shall engage in air transportation unless it has a certificate from the CAB authorizing it to do so. Section 401(d)(1) of the Act, 49 U.S.C. 1371(d)(1), states that the CAB shall issue the required certificate to the air carrier only:

> if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Chapter and the rules, regulations, and requirements of the [CAB] hereunder, and that such transportation is required by the public convenience and necessity. . . .

The air carriers which receive certificates issued under § 401 are certificated carriers. The CAB has adopted extensive regulations regarding how a § 401 certificate may be obtained, as well as how, where, and when the holder of such a certificate shall operate. [14]

Intra-state air carriers have traditionally not been subject to the Act or to CAB regulation. During the period with which the complaint is concerned, to retain its intra-state status—that is, to avoid becoming involved in interstate air transportation—an intra-state carrier could not accept passengers or baggage engaged in an inter-state journey, even though it would transport such passengers or baggage wholly within the borders of a single state.[11] Because of this fact, intra-state carriers have refused to accept passengers whose tickets showed them to be engaged in an interstate journey. Donnelley claims that these differences make intra-state carriers unique and require that their flights be listed separately.

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[11] Legislative developments occurring since 1977 have radically diminished the differences between certificated air carriers and most intra-state carriers. In November 1977 a new section was added to the Act providing that intra-state air carriers in California and Florida could accept passengers and baggage from certificated carriers and that joint fares, rates, and services between such carriers were subject to CAB regulation. Section 401(d)(4), 49 U.S.C. 1371(d)(4). This provision was broadened to include intra-state carriers in all states by Section 9 of the Airline Deregulation Act of 1978, Pub. Law 95-504, 92 Stat. 1705 (eff. Oct. 24, 1978). In addition, the Airline Deregulation Act amended the Federal Aviation Act to provide that intra-state carriers were entitled to apply to the CAB for certain interstate routes and, if their requests were granted, to become certificated air carriers. Of the seven intra-state airlines in existence in 1977, three have now received grants of interstate routes and become certificated carriers; as a result, all of their flights are now listed as certificated carrier flights. The December 15, 1978 issue of the OAG (RX 571) shows only six intra-state air carriers operating in the United States; their flights are listed separately from those of the other two classes of carriers.

Section 416(a) of the Act, 49 U.S.C. 1386(a), permits the CAB to establish classifications of air carriers "as the nature of the services performed shall require"; and § 416(b), 49 U.S.C. 1386(b), permits the CAB to exempt any air carrier or class of air carriers from the Act or rules or regulations adopted thereunder. Under § 416, the CAB has [15] created by regulation a classification of air carriers called "air taxi operators", of which commuter air carriers are a part. 14 CFR 298. Briefly, the regulations require that such carriers: (a) operate aircraft having thirty or fewer seats and a maximum "payload" capacity of not more than 7,500 pounds; (b) register with the CAB as an air taxi operator; and (c) maintain certain minimum liability insurance limits. The CAB has exempted commuter air carriers from virtually all the requirements of the Act and from the regulations applicable to certificated carriers. Donnelley argues that because certificated carriers are subject to strict regulation while commuters are not, certificated carriers are much more reliable than commuters in providing accurate flight schedule information; are safer than commuters; fly larger aircraft which are generally superior to those flown by commuters; provide amenities not available on many commuter flights; maintain superior airport facilities; and have special consumer protection obligations. These alleged differences will be taken up and discussed in order.

Donnelley has stated that it "is vitally concerned with the accuracy of the information contained [in the OAG] and with the reliability of the air carriers which list their services in the OAG." RX 221. Donnelley claims commuters have caused special problems in this regard because they frequently cease operations without notifying Donnelley.[12] When this happens, they say, listings for the discontinued flights may be published in the OAG for weeks or months before it is discovered that the airline has gone out of business. Complaint counsel point out correctly that several certificated carriers have also gone out of business. In addition, the ALJ found that the largest fifty commuter air carriers carry about 90% of all commuter traffic (*Initial Decision*, at p. 29, Finding 100), and there is no evidence that any of these carriers have been guilty of ceasing operations without informing Donnelley. Nevertheless, it appears that unannounced exit from the field does occur among smaller, newer commuter carriers. [16]

Donnelley argues that commuter carriers have a lower safety level than certificated carriers. Preliminary data for 1977 published by the National Transportation Safety Board reveal that the passenger fatality rate for commuter carriers was 1.48 per 100 million miles flown, while the corresponding passenger fatality rate for certificated carriers was 0.04. RX 563. Complaint counsel argue that these figures are not comparable because measuring safety in terms of fatalities per million miles flown is misleading. They say commuters fly much shorter routes than certificated carriers and consequently have many more takeoffs and landings per million miles flown than do certificated carriers, and it is during takeoff or landing that accidents usually occur. But according to other National Transportation Safety Board statistics which were cited and relied upon in a report by the Committee on Government Operations of the House of Representatives,[13] the accident rate for commuter airlines during 1976 was 1.57 accidents per 100,000 *departures*, while the certificated carriers' accident rate was only 0.44 accidents per 100,000 *departures*. Complaint counsel argue that even accident rates based on number of departures are unreliable measures of the comparative safety of commuter and certificated carriers because commuters frequently fly to remote, outlying areas where certificated carriers are unwilling or unable to fly. These areas may have relatively worse terrain and weather conditions, and smaller, less-safe airports. They argue that to get a truly accurate comparison of the safety records of the two types of carriers, one would have to compile statistics regarding the safety records of commuter and certificated carriers for those city-pairs where the two compete. Though we agree that such a study would provide a more accurate statement of the comparative safety of the two, we are persuaded by the statistics cited above and by other evidence[14] that Donnelley had cause to believe that certificated carriers, on the average, are safer than commuter carriers. *Cf. Initial Decision*, at p. 29, Finding 100. [17]

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[12] Donnelley buttresses this assertion with the following facts: (1) as of 1968 approximately 25% to 30% of the "air taxi" industry (of which commuters are a part) turned over each year; (2) from 1970 through 1972 an average of thirty commuter carriers ceased operations each year; and (3) during the period from 1970 until October 17, 1978 the flight schedule listings of 168 commuter carriers had been removed from the OAG.

Generally, certificated carriers fly larger, faster planes than commuters. One reason for this is that CAB regulations limit commuter air carriers to planes which have a capacity of no more than thirty seats and a "maximum payload" of 7500 pounds.[15] 14 CFR 298. Such planes usually fly at speeds between 200 and 300 miles per hour. *Initial Decision*, at p. 22, Finding 71. The larger jets typically operated by certificated carriers, on the other hand, carry 100 or more passengers and fly at speeds over 500 miles per hour. *Id*. However, the ALJ found that certificated carriers "sometimes" fly commuter type aircraft. *Id.* at p. 25, Finding 75.

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[13] Airline Deregulation and Aviation Safety, H.R. Rept. No. 930, 95th Cong., 2d. Sess. (1978) (hereinafter referred to as "H.R. Rept. on Aviation Safety"). RX 344.

[14] Certificated carriers and commuter carriers are governed in safety matters by different sections of the Federal Aviation Regulations, and the regulations governing certificated carriers are more stringent. *Initial Decision*, at p. 29, Finding 99.

[15] The Airline Deregulation Act of 1978, Pub. Law 95-504, 92 Stat. 1705, increased the size of the aircraft which commuter air carriers may operate to a maximum capacity of fifty-six passengers.

Certificated carriers' flights frequently offer amenities which are not available on many commuter flights, like on-board meals, lavatories, etc. But the ALJ found that since commuter carriers normally fly short routes averaging only about seventy-five miles, these amenities are not as important to passengers as other factors such as the time schedule of the flight. *Id.* at p. 25, Finding 77. Certificated carriers often have better ground facilities—like ticket, baggage, and boarding areas—than commuter carriers. *Id.* at p. 26, Finding 79. In addition, CAB regulations impose on certificated carriers certain consumer protection obligations which commuters do not have; these include denied boarding compensation, baggage liability, and "no smoking" sections.

Granting that some differences do exist, complaint counsel claim Donnelley's argument about all the differences among certificated, commuter, and intra-state carriers is a red herring. They say Donnelley does not really honor the strict legal categorizations which are said to produce these differences. Specifically, complaint counsel say that Donnelley lists the flights of commuter-type foreign air carriers and certain favored commuter carriers with the flights of certificated carriers. [18]

Donnelley does list the flights of foreign air carriers with the flights of certificated carriers.[16] Complaint counsel argue that foreign carriers "fly no larger aircraft, are no safer, are no more reliable and are no more preferred by passengers than are commuter and intrastate carriers." Complaint Counsel's Answering Brief, at 27. The ALJ found that foreign carriers frequently fly small aircraft like the ones flown by commuter airlines, and that they are not subject to safety regulations issued under the Federal Aviation Act. *Initial Decision*, at p. 25, Finding 73. Donnelley responds that foreign carriers have a legal status very similar to that of domestic certificated carriers. They point to § 402 of the Federal Aviation Act, 49 U.S.C. 1372, which is more or less parallel to § 401 (governing certificated air carriers). Section 402(a) provides that "[n]o foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the CAB authorizing such carrier to so engage."[17] Under § 402(b), the CAB may issue a permit to a foreign carrier only:

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[16] In fact, the ALJ found that of the 118 carriers now listed in the OAG as certificated carriers, 79 are foreign air carriers. *Id.* at p. 13, Finding 27.

[17] "Foreign air carrier" is defined in § 101(19) of the Act as "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." 49 USC 1301(19). Section 101(21) defines "foreign air transportation" as "the carriage by aircraft of persons or property . . . in commerce between . . . a place in the United States and any place outside thereof." 49 U.S.C. 1301(21).

> if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this chapter and the rules, regulations and requirements of the CAB hereunder, and that such transportation will be in the public interest.[18]

Donnelley argues that the fact that a foreign air carrier must obtain a permit from the CAB and subject itself to some CAB regulation means that it is like a domestic certificated carrier rather than like a commuter. Donnelley also claims that except for "a handful" of Caribbean foreign carriers, the foreign carriers listed in the certificated carrier section of the OAG include well-known overseas carriers like Air Canada, Air France, British Airways, etc. [19]

Complaint counsel also point to the fact that the flights of certain commuter "replacement" carriers are listed with the flights of certificated carriers in the OAG. A replacement carrier is a commuter carrier which enters into an agreement with a certificated carrier whereby the commuter provides service in place of the certificated carrier over some of the certificated carrier's routes to smaller cities. Such an arrangement allows the certificated carrier to maintain its route authority to the smaller communities and simultaneously serve those areas at the lower cost associated with operating smaller "commuter" aircraft. The main example of this is the replacement carriers serving Allegheny. These "Allegheny commuters" have had their flights listed with those of the certificated carriers since 1969. They are marked with a symbol in the shape of a square next to the flight number. In the "Abbreviations and Reference Marks" section of the OAG the symbol is defined as follows: "[Symbol] Following Flight Number Indicates A Replacement Flight Operated By A Commuter Air Carrier On Behalf Of A Certificated Carrier Pursuant To A CAB Approved Agreement."[19] Thirty commuter carriers operate replacement flights for certificated carriers Alaska Airlines and Wien Air Alaska, Inc. and receive the same display treatment as Allegheny commuters in the OAG. Altogether about 700 of the 50,000 direct flights listed in a recent issue of the OAG were replacement flights operated by commuters but listed in the certificated section. *Initial Decision*, at p. 15, Finding 32.

Donnelley argues that listing these commuter replacement carriers with the certificated carriers is not inconsistent with its previously stated policy on separate groupings because the replacement flights are listed with certificated flights only if the replacement arrangement arises pursuant to an agreement approved by the CAB. Donnelley also claims that it enforces strict requirements concerning the operation of the replacement flights, including one that both the commuter replacement carrier and the certificated carrier identify the replacement flight as that of the certificated carrier. In this regard, Donnelley makes much of the fact that Allegheny commuters are flown under Allegheny's logo and colors, and that even their ticket counters and other ground facilities are made to look like Allegheny's. And they also point out that other commuter replacement carriers have been denied listing in the certificated section of the [20]OAG despite the fact that they operate their replacement flights pursuant to a CAB approved contract; the reason given by Donnelley for this in at least one case was that the commuter replacement flights were "operated under the name and in all appearances as a commuter. . . . There is no requirement similar to the Allegheny requirement that the airplanes, ticket counters and other facilities, etc., be made to look like [the certificated carrier being replaced]." CX 131A. It was established at the hearings, however, that at least one Allegheny commuter flight is flown under the commuter airline's colors and logo, rather than Allegheny's. Transcript, at 2572–75. In addition, it appears that the Alaska replacement carriers do not fly under the certificated carriers' colors and logo, but merely place a card or placard announcing the name of the replaced certificated carrier at the ticket counter and on the aircraft. Donnelley has offered no explanation for this inconsistency.

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[18] *Compare* Section 401(d)(1), relating to certificated carriers, at page 13, *supra*.

[19] It is complaint counsel's contention that if the listings of all three classes of carriers were combined, a marking like this one would be a sufficient means of putting a user of the OAG on notice that a flight was a commuter or intrastate flight.

III. DISCUSSION OF LAW

A. *Relevant Market.*

Since one of the theories of violation in this case involves an allegation that Donnelley is a monopolist, we must determine the relevant market within which Donnelley operates. There is agreement between the parties that the relevant geographic market in this case is the United States. *Initial Decision*, at p. 44.

Though the parties disagree over the relevant product market, the ALJ found that there are no substitutes for the OAG, and that it therefore comprises a separate product market in the providing of flight information about scheduled passenger air transportation service in the United States. *Id.* at pp. 16–19, Findings 35–51, and pp. 44–47. We believe this finding is correct. The OAG is the only complete listing of scheduled flights in North America; it is the primary source of flight schedule information for the flying public and the primary marketing tool for carriers. *Id.* at p. 16, Finding 35. It is referred to in the airline industry as the "Bible". Citing *United States* v. *E.I. DuPont* *de Nemours & Co.*, 351 U.S. 377 (1955), Donnelley argues that the ALJ wrongly excluded several reasonably interchangeable substitutes for the OAG; specifically, Donnelley mentions media advertising, computerized schedule information, and system timetables published by individual air carriers. But a review of the record convinces us that none of these is an effective substitute for the OAG. [21]

Air carriers do sometimes use radio, television, and newspapers to advertise their flights, and in some instances those advertisements contain limited flight schedule information. But when flight information is included in an advertisement, it is only for the flights of the particular carrier purchasing the advertisement and even then it is normally limited to a few city-pairs. *Initial Decision*, at p. 19, Finding 50. In addition, travel agents and corporate travel departments—a major sub-category of "purchasers", *see United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966)—do not normally use radio, television, or newspaper advertisements to obtain flight information and book flights. *Initial Decision*, at p. 19, Finding 51.

Many air carriers rely to some extent on computer tapes upon which airline schedule information has been coded. These are called "SCIP" tapes; SCIP is an acronym for Schedule Change Input Package. When the information on a SCIP tape is called for by the operator of the computer terminal, it is displayed on a cathode ray tube. Using SCIP tapes is much more expensive than using the OAG: the annual cost of a cathode ray tube for an office doing between $2,500,000 to $3,000,000 per year in business would be $15,000 to $16,000, while a year's subscription to the OAG costs $98.44.[20] Consequently, very few travel agencies or corporate travel offices can justify the cost of SCIP tapes. And even those airlines, travel agents, and corporations which have access to SCIP tapes also subscribe to the OAG and use it in conjunction with the SCIP tapes; this is because SCIP tapes normally contain less flight schedule information than does the OAG. Moreover, Donnelley itself is a major supplier of this purported substitute to the OAG, as it supplies SCIP tapes to twenty-five certificated carriers. Transcript, at 4127.

Most air carriers print and distribute their own individual timetables containing flight schedule information. These timetables generally contain flight schedule listings only for the carrier distributing them, and they usually have only local or limited distribution. These timetables are expensive: one witness testified that each timetable cost his company approximately $.50. Transcript, at 840. Airlines, travel agents, and corporate travel offices normally do not use airlines' individual timetables to obtain flight information. [22]

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[20] *Cf. Int'l Boxing Club* v. *United States*, 358 U.S. 242 (1959), where significant price differences were emphasized in carving out a separate product market.

The OAG is recognized in the industry as being unique and indispensable; there are substantial price differences between the OAG and its purported substitutes; and there are distinct users of the OAG for whom no other product will do. For these reasons, we hold that the OAG comprises a separate product market. *See Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

B. *Competition Between Certificated and Non-Certificated Carriers.*

The ALJ found that commuter and intra-state carriers compete with certificated carriers. *Initial Decision*, at pp. 22-27, Findings 67-92. Donnelley asserts that there is only *de minimis* competition between certificated and non-certificated carriers and that the ALJ's finding should be reversed. We believe the ALJ's finding is supported by the record.

In April 1975 there were 432 city-pairs served by direct flights of both commuter and certificated carriers. CX 135E. In the one-year periods ending June 30, 1973 and June 30, 1974, commuter and certificated carriers competed in eighty-two city-pair markets in which passengers totaled 1,000 or more. For the period ending in June 1973 commuters accounted for almost 1,000,000 passengers in those eighty-two markets, while certificated carriers accounted for over 4,000,000 passengers. The passengers flying on commuter air carriers in those eighty-two markets during that period represented 17.5% of all commuter traffic in the contiguous forty-eight states for the period. For the period ending in June 1974 commuter carriers had almost 900,000 passengers in the eighty-two markets, and certificated carriers had over 4,000,000. The 900,000 commuter passengers represented 19.6% of all commuter traffic in the forty-eight states for that period. A report prepared by the CAB entitled "Commuter Carrier-Certificated Carrier Competition" states that there were "twenty-four markets in which commuters generated 10,000 or more passengers in [fiscal year] 1973 *in competition* with certificated carriers . . . " and "24 markets in which certificated carriers generated 50,000 or more . . . passengers in [fiscal year] 1973 *in competition* with commuter carriers . . . " CX 61 (emphasis added.) The report went on to say that "[c]ommuter market shares ranged from 0.49% to 35.31%."[21] [23]

Donnelley argues that competition is *de minimis* because the total number of passengers carried by commuter carriers in the period ending in June 1974 comprised less than one-half of 1% of the 190,000,000 passengers carried by certificated air carriers in scheduled domestic passenger service in 1974. But the same argument advanced by Donnelley here was rejected by the Second Circuit in *United States* v. *Consolidated Laundries*, 291 F.2d 563 (2d Cir. 1961). In that case linen suppliers were charged with violating § 1 of the Sherman Act by allocating out-of-state customers. The court stated:

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[21] A CAB report by the same name prepared for the year ending June 30, 1974 had similar findings.

> Appellants seemingly rely on a *de minimis* exception; they argue that interstate customers' service amounts to only 1% of all service. But (even accepting appellants' figures) such 1% amounted in 1954 to $523,168 worth of business, a "volume of business . . . [which] cannot be said to be insignificant or insubstantial." That this substantial amount of interstate commerce amounted to only 1% of the total industry's volume is without significance. *Id.* at 573 (citations omitted).

See also International Salt Co. v. *United States*, 332 U.S. 392 (1947). If $500,000 is more than *de minimis* competition, then *a fortiori* the tens of millions of dollars of revenues involved in the carrying of passengers by commuter and certificated carriers in the city-pairs in which they compete is not *de minimis*.

The ALJ also found that there has been substantial competition between certificated and intra-state carriers. *See Initial Decision*, at p. 28, Findings 93–97. We concur in this finding. Certificated and intra-state carriers often serve the same city-pairs. Southwest Airlines, an intra-state carrier, competes in all twenty-five of its city pairs with certificated carriers. Air Florida and Air California, two other intra-state carriers, also compete with certificated carriers in various city-pairs. In addition, both an expert witness called by Donnelley and Donnelley's own Publication Manager testified that intra-state carriers compete with certificated carriers. Transcript, at 3326–29, 3394. [24]

C. *Jurisdiction.*

Donnelley has urged strongly throughout this proceeding that the FTC lacks jurisdiction over the "subject matter" of the complaint.[22] Upon review we conclude that the FTC does have jurisdiction in this proceeding.

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[22] Early in the proceeding, Donnelley moved to dismiss the complaint on the grounds of lack of jurisdiction. The ALJ denied this motion and refused to certify the question to the Commission; and the Commission denied Donnelley's extraordinary appeal. Respondent thereupon sought injunctive relief in the United States District Court for the Northern District of Illinois. That court held that the FTC lacked jurisdiction and enjoined the Commission from further proceedings. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977–2] Trade Cas. (CCH) ¶61,721 (N.D. Ill. 1977). Shortly thereafter the same court vacated its order on the grounds that Donnelley had failed to exhaust its administrative remedies. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977–2] Trade Cas. (CCH) ¶61,788 (N.D. Ill. 1977). Both sides appealed and the Court of Appeals for the Seventh Circuit held that venue was improper in the Northern District of Illinois. *The Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). The case was then transferred to the United States District Court for the District of Columbia, where the court dismissed Donnelley's complaint for failure to exhaust administrative remedies.

Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1), bans unfair methods of competition and unfair or deceptive acts or practices. Section 5(a)(2), 15 U.S.C. 45(a)(2), states that the FTC is empowered to enforce this ban against persons, partnerships, or corporations "except banks, common carriers subject to the Acts to regulate commerce, *air carriers, and foreign air carriers subject to the Federal Aviation Act of 1958,* and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act. . . ." (Emphasis added.) On its face, this section appears to answer the question of whether the FTC has jurisdiction over Donnelley and its acts, practices, and methods of competition. Donnelley is not an air carrier or a foreign air carrier, and therefore the Commission apparently has jurisdiction. But Donnelley argues that the issue is not that simple. The key language of Section 5(a)(2) does not just exclude air carriers from *in personam* jurisdiction, Donnelley contends; rather, it excludes the whole subject of competition among air carriers from the FTC's "subject matter" jurisdiction. And this means that the FTC has no jurisdiction over this proceeding, because it "is limited exclusively to competition among air carriers." Respondent's Appeal Brief, at 8. [25]

Donnelley relies entirely on the 1921 case of *Fruit Growers' Express Inc.* v. *FTC*, 274 F. 205 (7th Cir. 1921), *cert. dismissed*, 261 U.S. 629 (1923). In that case the FTC struck down an exclusive dealing clause in a contract between Fruit Growers Express (which was not a common carrier) and certain railroads, claiming that it violated Section 3 of the Clayton Act, 15 U.S.C. 14. On appeal, the court noted that under Section 11 of the Clayton Act, 15 U.S.C. 21, jurisdiction to enforce Section 3 is divided among the FTC and certain other agencies. In relevant part, Section 11 states that jurisdiction is "vested in the Interstate Commerce Commission *where applicable to common carriers subject to the Interstate Commerce Act,* . . . and in the Federal Trade Commission where applicable to all other character of commerce . . . ." (Emphasis added.) Turning to the challenged exclusive dealing clause, the court noted that striking it from the contract would remove the railroads' only obligation to provide consideration, thus destroying the mutuality of the contract and rendering it unenforceable. This led the court to observe: "Such being the effect of the [FTC's] finding and order, the carriers were necessary parties." 274 F. at 207. The court continued:

> The words 'where applicable to common carriers' in section 11 of the Clayton Act must mean that where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. The action complained of involved common carriers and tended to very greatly affect their business. Respondent was therefore without jurisdiction. *Id.*

The court's holding turns on its finding that the carriers were necessary parties to an action which would impair their contractual rights, and on the fact that the "where applicable to common carriers" language of Section 11 is ambiguous and suggests subject matter jurisdiction.

The jurisdictional question on appeal before us now is different. Jurisdiction to enforce the FTC Act is vested solely in the FTC, but language in Section 5(a)(2)—"except air carriers and foreign air carriers"—operates *in personam* to exempt a very narrow class of businesses from the FTC's jurisdiction. A case more closely analagous to this case is *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), involving an investigation of Morgan Drive Away, Inc., a common carrier subject to the Interstate Commerce Act. The FTC had adopted a resolution authorizing the use of compulsory process to [26]determine whether Morgan had violated Section 5 of the FTC Act—"including false or misleading advertising or misrepresentation in connection with the solicitation of persons to become owner-operators in the nationwide mobile-home transporting industry." 549 F.2d at 454. Morgan asserted that the FTC lacked jurisdiction to investigate it because it was a common carrier, pointing to Section 6(a) of the FTC Act, 15 U.S.C. 46(a), which states that the FTC shall have the power to investigate persons, partnerships, or corporations "excepting banks *and common carriers subject to the Act to regulate commerce* . . ."[23] (Emphasis added.) The FTC argued that this language did not deprive it of jurisdiction over Morgan because the investigation focused on Morgan's promotional activities, which were not subject to regulation under the Interstate Commerce Act. That is, the FTC argued that the jurisdictional exemption created in Section 6 did not operate *in personam* to exclude common carriers from FTC jurisdiction altogether, but rather only operated to exclude the FTC from "subject matter" jurisdiction over "activities" which were subject to regulation under the Interstate Commerce Act. The Court of Appeals rejected this argument, saying: "The exemption is in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under that Act."[24] 549 F.2d at 455.

The court's language is equally applicable to the jurisdictional exemption in Section 5 for "air carriers and foreign air carriers subject to the Federal Aviation Act": the exemption is in terms of status as an air carrier subject to the Federal Aviation Act, not activities subject to regulation under that Act. [27]

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[23] This Section 6 language ("excepting . . . common carriers") is almost identical to the Section 5 language quoted above ("except common carriers") and to the Section 5 language about air carriers ("except . . . air carriers"). But all of this language from Section 5 and Section 6 is different from the language of Section 11 of the Clayton Act—"where applicable to common carriers".

[24] The court did state elsewhere: "We need not decide whether the FTC is correct in its statement that the noncarrier activities of a common carrier do not fall within the scope of the Section 6 exemption." 549 F. 2d at 455. Thus, the court saved for another day the question of whether a company which engages in activities as a common carrier and in activities which are unrelated to being a common carrier would be entirely exempt from the FTC's jurisdiction, or whether its non-carrier activities might be reached by the FTC.

In the injunction action regarding this proceeding in the Northern District of Illinois (*see* page 24 n.22, *supra*), the court held that "the phrase 'prevent corporations . . . except air carriers . . . from using unfair methods of competition' should be read to mean 'exercise jurisdiction over unfair methods of competition, except among air carriers.'"[25] [1977-2] Trade Cas. (CCH), at p. 72,943. The court relied entirely on *Fruit Growers' Express* and did not even mention *Miller* except for a citation on a side issue. *Id.* at p. 72,944. This total reliance on *Fruit Growers' Express* prompted the court to "redraft" Section 5(a)(2) of the FTC Act so as to make it identical to Section 11 of the Clayton Act, thereby making *Fruit Growers' Express* the controlling precedent.[26] The court explained that the FTC Act and the Clayton Act were both enacted in 1914 and are *in pari materia;* the purpose of Section 5(a)(2) is parallel to that of Section 11; there is some overlap between the substantive provisions of the two acts; and it would be an incongruous result for Section 11 to be different in any way from Section 5(a)(2). While the court applied a rigorous logic in its analysis, we believe it was pulling in the wrong direction. Given the fact that the *Miller* case is much more recent and is based on an additional sixty years' experience with the regulatory scheme in question, we believe Section 11 and *Fruit Growers' Express* should be brought into line with Section 5(a)(2) and *Miller*, rather than *vice versa*. It appears that the "against the grain" construction engaged in by the district court may have resulted from the following misstatement of who has the burden of establishing the contours of a special exception to a regulatory scheme:

> *Defendants [the FTC] have advanced no reason* why Congress should have exempted the subject of competition between air carriers from the FTC's jurisdiction under [28]the Clayton Act, and have given the same subject back to the FTC under §5(a)(2) of the FTC Act while simultaneously depriving it of jurisdiction over the carriers themselves.[27] *Id.* at 72,943. (Emphasis added).

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[25] As we noted at page 24 fn. 22, *supra*, the district court subsequently vacated its order barring the FTC from proceeding against Donnelley.

[26] The Court took this approach in the face of its avowal that "Section 11 of the Clayton Act is more clearly phrased in subject matter jurisdiction terms than is Section 5(a)(2), and consequently *Fruit Growers' Express* does not directly control this case." [1977] Trade Cas. (CCH), at p. 72,942.

[27] The court's statement that Congress "exempted the subject of competition between air carriers from the FTC's jurisdiction under the Clayton Act" is almost certainly incorrect in itself. The statement is apparently based on the court's belief that *Fruit Growers' Express* means that under the Clayton Act, the FTC does not have jurisdiction over any acts (by whomsoever) which affect competition among air carriers. But as we said before, the decision in *Fruit Growers' Express* turned on the fact that certain common carriers were adjudged to be necessary parties to that action. No one has even suggested that any air carriers are necessary parties to this proceeding.

Placing the burden on the FTC in this manner runs directly contrary to the Supreme Court's pronouncement that the "burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . ." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

Even if we accept the court's approach to the jurisdictional issue, its finding of lack of jurisdiction in this proceeding is based on an erroneous factual assumption. The court stated:

> Defendants now seek to characterize the complaint as being based in part on plaintiff's abuse of its monopoly position, and the court agrees that there may be cases in which the FTC may properly exercise jurisdiction over restraints of trade in a non-exempt line of commerce despite their effect upon an exempt line. But in this case . . . [i]t is clear from the complaint that plaintiff is accused of working in cooperation with the major air carriers to stifle competition by smaller carriers. [1977–2] Trade Cas. (CCH), at 72, 943.

Thus the court's holding is based on an assumption that this is exclusively a conspiracy case. But the complaint alleges that Donnelley's acts, "both individually and in combination with others," are in violation of Section 5. Complaint ¶17. As [29]will be seen in the pages that follow, our finding of liability here is not based upon a finding of unfair competition "among air carriers." Rather, liability is based upon Donnelley's abuse of its monopoly position.

D. *Alleged Unfair Methods of Competition.*

1. The Alleged Conspiracy.

Complaint counsel allege that in 1971 Donnelley had decided to begin to publish connecting flight listings for commuter and intra-state carriers, and to combine the listings of all three classes of carriers into only two categories for each city pair—direct and connecting. They say key Donnelley officials then arranged to confer with certificated air carrier representatives at a formal meeting to determine whether the plan met with the certificated carriers' approval. At the meeting the certificated carriers voiced strong opposition to the proposal. Complaint counsel claim the Donnelley officials who attended the meeting carried this message back to their superiors, and a decision not to go through with the changes resulted. All of this adds up to an allegation that Donnelley and the certificated carriers agreed that Donnelley would not change its format so as to dispense with the listing practices challenged in this action.

If these allegations were proved, they could add up to an illegal conspiracy in restraint of trade. However, a close review of the evidence convinces us that there is some doubt whether anyone from

Donnelley entered into "an agreement, tacit or express", with the certificated carriers. *Theater Enterprises* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). The question is so close that a detailed summary of the events transpiring at the time must be set out.

As of 1971 the OAG had for many years published the direct flights of certificated, commuter, and intra-state carriers under three separate headings. And as of 1971 the OAG did not publish connecting flight listings for commuter and intra-state carriers at all. Prior to 1971 representatives of a trade association of commuter air carriers had urged Donnelley to change these policies, but Donnelley had refused.

In 1971 Parrish, who was then the Publisher of the OAG, and Howe, the Publication Manager,[28] changed their minds and concluded that commuter and intra-state connecting [30]flight listings should be published and that the listings of all three classes of carriers should be merged. In an August 18, 1971 memorandum entitled "Merge [sic] of Commuter Air Carrier Flights With Certificated Air Carriers",[29] Howe made a list of the "pros" and "cons" of changing Donnelley's format to incorporate these changes. He listed seven "pros", among which were simplification of the format (there would have been only two listings under each city-pair—direct flights and connecting flights—rather than the four they had then); "line savings"—that is, space saved by removing the headings "Commuters" and "Intra-state" everywhere they appeared in the OAG; "more paid connex potential"—that is, extra revenues realized from payments made to the OAG for the additional connecting flight listings; and "eventual change". Only two "cons" were listed: "certificated carrier objection" and "subscriber objections(?)".

In early September 1971 Howe and Parrish decided to discuss their idea for changing the OAG's format with representatives of the certificated carriers. They decided to go about this by presenting their proposal to the Airlines Guide Committee (the "AGC") of the Air Traffic Conference of America, which was a part of the Air Transport Association of America (the trade association of certificated carriers). The AGC had scheduled a meeting for October 7, 1971, and Howe sent the following teletype message to the AGC on September 10, 1971:

> OAG would like to discuss the merger of Certificated, Commuter and Intra-State Air Carrier schedules. OAG thoughts will be presented October 7. We would appreciate carriers coming to the meeting prepared to discuss their respective management opinions. Direct flight listings would be together chronologically as currently shown. Commuter and Intra-State Air Carriers would have the option to purchase on-line

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[28] Howe reported directly to Parrish.

[29] It is clear from the contents of this memo that it is concerned with the listing of commuter and intra-state carrier connections as well.

connections with Certificated Carriers and vice versa. Only two categories of listings, direct and connections, would exist rather than the present four.

[31]On September 13, 1971 a bulletin containing the agenda for the October 7 meeting was sent to all members of the AGC. *See* CX 99. Item 7 on the agenda was entitled "Merger of Schedules". The description of this item on the agenda was in all material respects like the description in Howe's teletype message. It concluded with the statement that members "should be prepared to discuss their respective management positions."

At the AGC meeting Parrish presented the proposal for changing the format of the OAG and discussed it with the certificated carrier representatives present. At the end of the discussion, a vote was taken. *See Initial Decision*, at p. 21, Finding 63. Various persons present recorded the outcome. The official minutes of the meeting, which were distributed to all certificated carrier members and the Donnelley officials present, described it as follows: "During discussion [of Item 7] it became obvious that there was no support for the proposal, therefore, no further action was required." CX 9H. Howe's own notes state that "the carriers were with the exception of [American and National Airlines], against the merger of schedule listings." CX 10D. A subsequent memo prepared by him states that "[o]ne [certificated] carrier was concerned in that noncertificated carrier[s] had no restrictions on routes and therefore could parallel the [routes of] certificated carriers at will." CX 19C. The notes of the Allegheny representative at the meeting state: "No mix[,] vote very heavy." CX 89C. TWA's representative to the meeting wrote in a report to his superior: "[I]t was agreed not to merge the schedules." CX 66A.

Reich, who was then the Senior Vice President of Donnelley and the man with the final word on any changes in the format of the OAG (Transcript 1183-84), testified that he first learned of the October meeting shortly after it took place. He stated that he had no idea that plans had been made to discuss changes in the format of the OAG with certificated carrier representatives, and that he was surprised and distressed when he learned that this had been done. Transcript 1204-05, 1250. This testimony was not contradicted. He further testified:

> I was very unhappy with Mr. Parrish because I had considered this subject to be thoroughly decided and . . . while there had been arguments advanced in favor of making this merger, I thought they had been resolved and, therefore, a proposal to change that, it seemed to me to be out of order. Transcript 1205-06.

[32]After he learned that the meeting had occurred, Reich conducted an investigation to determine what had gone on. Transcript 1775, 1889.

After the AGC meeting, and after the internal Donnelley discussions which occurred when Reich learned of the October 7 meeting, both Parrish and Howe urged that the proposed changes in the OAG's format be made.[30] In effect, they urged that action be taken contrary to what they are accused of having agreed to with the certificated carriers. On November 29, 1971 Parrish sent a formal memo to Reich recommending that the listings of all three classes of carriers be merged, and that commuter flights be marked with a square beside the flight number.[31] *See* CX 12. By letter of December 10, 1971 Reich answered him, stating that he was opposed to merging the listings. *See* RX 111. He stated:

> I am much concerned about the reliability of the service performed by the commuter carriers as of this date both from a standpoint of adherence to schedules and safety. It would seem to me that our best present policy would be to wait until the CAB has taken a greater responsibility in connection with these carriers and has, in effect, given its seal of approval to their operations.

This letter from Reich constituted the last word on the subject, and the changes were not made.[32]

[33]In determining whether Donnelley was influenced not to change the OAG's format as a result of the October 7 meeting, we must determine whether some person at Donnelley was influenced by the meeting and can be said to have agreed, expressly or tacitly, with the certificated carriers not to change the format. Since Parrish and Howe, who attended the meeting "on behalf" of Donnelley, came away from the meeting urging that the format be changed, it is impossible to say that they were influenced by the meeting or that they agreed not to make the changes, even though some of the certificated carriers represented at the meeting believed they had agreed. Therefore, we must focus on Reich and what we can infer about his state of mind, as he was the person who had ultimate responsibility for deciding whether to go through with the proposed changes. He testified that when he first learned of the meeting and began to investigate, he was informed that the certificated carrier representatives at the meeting "didn't all feel strongly one way or the other" about the proposed changes in the format of the OAG (Transcript at 1250), and that "there was evidence that [the certificated carriers] were on both sides." (Transcript at 1218). However, Howe testified that when Reich found out about the meeting he sought out background documents to

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[30] Howe testified at the hearings that he changed his mind back and forth on this matter many times. Transcript at 1832. But several days after the October 7, 1971 meeting he sent a memo to Parrish recommending merger. *See* RX 10.

[31] It is clear from the memo that Parrish was also recommending that the OAG publish connecting flight information for commuter and intra-state carriers.

[32] Except that the OAG did begin to list connecting flight information for commuter and intra-state carriers in December 1976. See the discussion of this at page 8 fn.5, *supra*.

discover what had gone on (Transcript at 1889); and given the flavor of the notes and memos prepared by Howe concerning the meeting, it is unlikely that Reich could have been told anything other than that the certificated carriers strongly opposed the proposed changes. But in any event Reich testified that even if the certificated carriers had been for the proposed changes, he still would have refused to make them:

> We would have adopted exactly the same policy we did. We were not concerned with [the certificated carriers]. That was one of the reasons I was unhappy with Parrish. This was a decision we wanted to make without any input from other sources. We were jealous you might say of our privacy in publishing the guide. Transcript at 1208.

There is no evidence that Reich, who made the decision not to change the format of the OAG, was even considering any proposed changes, or was influenced to retain the OAG's previous listing policy because of the certificated carriers' expressed desire. In light of Reich's uncontradicted [34]testimony that he made the decision on his own, we conclude that there is not adequate proof to demonstrate that a conspiracy existed.[33]

In reaching this finding, we reverse the ALJ's determination that Donnelley did conspire with certificated air carriers. The ALJ based his holding that a conspiracy existed on a finding that after the October 7 meeting with the certificated carriers, "Mr. Howe and Mr. Parrish changed their minds about merging schedules and printing commuter connections" (*id.* at p. 40), and on a finding that air carriers are "substantial customers" of Donnelley and pay it several million dollars a year for various goods and services (*id.* at p. 21, Finding 65). The evidence conclusively establishes, however, that Howe and Parrish continued to urge the changes in the OAG's format even after the October 7 meeting. And the fact that the certificated carriers had substantial leverage over Donnelley, because of their many [35] purchases from it, does not prove that Donnelley entered into an illegal agreement with those carriers. Finally, we think it is crucial that the ALJ, in setting out the evidence relating to the alleged conspiracy, failed to consider Reich's role at all. As we said earlier, Reich was the pivotal figure in the conspiracy drama, and his decision not to carry out the proposed changes in the OAG was not shown to be the product of an agreement.

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[33] Complaint counsel point to the fact that Donnelley failed to call Parrish as a witness, noting that he actually attended the meeting as the Publisher of the OAG. They argue that this failure to call him should give rise to an inference unfavorable to Donnelley, and cite *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939), as support. In that case, the Supreme Court did draw an inference unfavorable to the defendants based on their failure to call persons with key knowledge of the events to testify. *See also Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 175 (1973); *NLRB* V. *Dorn's Transp. Co.*, 405 F.2d 706, 713 (2d Cir. 1969). But in *Interstate Circuit*, the defendants "failed to tender the testimony, at their command, of any officer or agent . . . who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action." 306 U.S. at 225. By contrast, in this proceeding Reich and Howe, who may be said to have had information equal to Parrish in regard to the facts in question, testified at length. This is important because "there is a general limitation . . . that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be *superior* in respect to the fact to be proved." *Wigmore on Evidence*, § 287, at pp. 286–87 (*Little, Brown & Co.* 1977) (emphasis in the original); *see also NLRB* v. *Dorn's Transp. Co.*, *supra*, at 713 (the testimony of the person who was not called was "critical"). We see no basis on which to conclude that Parrish, if he had testified, would have provided information "superior" to that of Howe and Reich.

E. *Duty of a Monopolist.*

1. The legal standard.

Since we find that a conspiracy between Donnelley and the certificated carriers was not established, we must turn to the question of whether Donnelley, as a monopolist, had some duty under the FTC Act not to discriminate unjustifiably between the competing classes of carriers so as to place one class at a significant competitive disadvantage. Stated another way, we must determine whether, as a matter of law, the owner of a "scarce resource"—here, the OAG—must exploit that resource in a manner which creates no unjustified or invidious distinctions among competitors seeking access to that scarce resource.[34] If it is determined that Donnelley did have such a legal duty, then we must consider whether Donnelley breached this duty and thereby violated the FTC Act, by failing: (a) to publish connecting flight information for commuter carriers; and/or (b) to combine the flight schedule listings of all three classes of carriers. [36]

It is important to note how this case differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations. In *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954), the court held that United Shoe had monopolized the market in shoe machinery in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The court's holding was based on a finding that United Shoe had obtained its monopoly power by, *inter alia*, engaging in practices which had "operated as barriers to competition". 110 F. Supp. at 297. Foremost among these was its "lease-only" policy, under which it refused to sell its machines. Because this policy eliminated a "second-hand" market in shoe machinery and raised barriers to new entrants, it was found to have injured United Shoe's actual and potential competitors in the production of shoe machinery and, in turn, to have helped maintain United Shoe's existing monopoly power. Here, by contrast, none of Donnelley's challenged acts is alleged to have maintained or enhanced its monopoly power in the market the OAG dominates.

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[34] Previous discussions of whether a monopolist has some duty not to discriminate have typically stated the issue so as to involve a monopolist's treatment of its customers or suppliers. In this case, air carriers are required to pay for most connecting flight listings, so with regard to Donnelley's failure to list certain connections, we are considering its behavior toward customers of a sort. Direct flight listings, on the other hand, are published in the OAG free; therefore, with regard to Donnelley's failure to combine the listings of all three classes of carriers, we cannot say that the air carriers are customers or suppliers. But whether the affected carriers sell to Donnelley or purchase from it is relatively unimportant. What is important is that, due to Donnelley's monopoly power in the market of information about scheduled passenger air transportation, the OAG is a scarce resource to which an air carrier must have access if it is to compete effectively.

In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), Otter Tail was a vertically integrated company which generated electric power, transported it over its electric transmission lines, and distributed it "at retail" to towns in its geographic area. Otter Tail had a monopoly in electric transmission lines in the area. When several towns refused to renew Otter Tail's franchise to distribute power at retail (having chosen to undertake this operation for themselves), Otter Tail refused to supply electric power at wholesale to the towns or to allow its electric transmission lines to be used to transport power from elsewhere. The Supreme Court found a violation of Section 2 of the Sherman Act. One of the grounds for this holding was that Otter Tail had used its monopoly power in one market (transmission lines) to enhance a monopoly in another market (retail distribution).[35]

[37]In this case though, Donnelley's policies, which have affected competition in the air transportation market, were not intended to benefit Donnelley in that market.

The question we are presented with is outside the mainstream of law concerning monopolies and monopolization. Indeed, there is very little law squarely on point. The seminal case regarding our question is *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *aff'd sub nom. LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966) (*"LaPeyre"*). In *LaPeyre*, the Peelers Company held certain patents which gave it a monopoly in manufacturing and distributing machinery which peeled shrimp. This machinery was virtually indispensable in the shrimp canning industry because of the high cost of peeling shrimp by hand. Peelers had a lease-only policy, and their leasing charge was two times higher for canners located in the Northwest United States than for those located on the Gulf Coast. Peelers explained that the reason for this difference was that the Northwest shrimp were smaller than the Gulf Coast shrimp and required twice as much hand labor to process. Peelers argued that even though a machine to process the smaller Northwest shrimp cost no more to build or maintain than a machine to process the larger Gulf

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[35] *See also Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966), where the court upheld a cause of action alleging that the only licensed television station in a Florida town had used its monopoly in broadcasting to further its plan to create a monopoly in the preparation of television advertising. The court stated: "The theory is that [defendants] used their legal monopoly power in a separate but related field in which a monopolistic regulated industry is not the national policy." *Cf. United States* v. *Griffith*, 334 U.S. 100 (1948), for an example of horizontal extension of market power from one geographic market to another.

Coast shrimp, their machines were substitutes for hand labor and they were entitled to set the leasing charge for the machines so as to reflect the amount of hand labor saved. In essence, their claim was that they were maximizing their profits by setting the price in each area to reflect what the market would bear.

The same family which owned Peelers Company also owned Grand Caillou, a shrimp canning business on the Gulf Coast. The Commission seized on this fact and held that Peelers' discriminatory pricing policy was an unfair method of competition under Section 5 because it was intended to protect Grand Caillou from the competition of the Northwest canners. In a thoughtful and prescient concurring opinion, Commissioner Elman took a slightly different approach:

> [T]he problem of this case is . . . the duty, if any, of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers.
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> . . . . Respondents enjoy a complete monopoly of an economically significant and commercially important product market, *i.e.*, machinery for processing shrimp for canning purposes. Firms possessing monopoly power . . . are . . . subject, under the antitrust laws, to some [38]of the obligations of fair and equal treatment borne by publicly regulated utilities. *See, e.g., Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *Terminal R. R. Assn.*., 224 U.S. 383. A course of conduct that would be lawful if engaged in by a non-monopolist may, therefore, be an unfair method of competition when engaged in by a monopolist.
>
> . . . . Respondents, by charging a monopolist's discriminatory price, have prevented the equalization of processing costs made possible by the invention of shrimp processing machinery, and have thereby prevented Northwest canners from competing effectively.
>
> . . . . The result, which is not dictated by efficiency . . . but by monopoly power, is clearly opposed to the objectives of anti-trust policy . . . . In the circumstances respondents' refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms is an abuse of monopoly power. It has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5. 65 F.T.C. at 867–69.

On appeal, the Fifth Circuit affirmed the idea of a special obligation on the part of a monopolist not to injure customers:

> [T]he problem of this case is . . . the duty of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. . . . The majority found that petitioners were attempting to protect their own interests as shrimp canners (Grand Caillou) from the competition of the Northwest canners. Commissioner Elman did not agree on the question of motive. His rationale was that the petitioners were simply attempting to maximize their profits, and that they were charging what the traffic would bear with, as it happens, discriminatory results. We need not resolve these contrary findings as to motive. [39]
>
> Both the majority and Commissioner Elman found that the central characteristic was the same—the utilization of monopoly power in one market resulting in discrimination

> and the curtailment of competition in another. . . . [T]here is abundant evidence in the record in support of the Commission's conclusion that Peelers leasing procedure is innately discriminatory and anti-competitive in its effect and that in circumstances of the instant case, the refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5." 366 F.2d at 120-21.

In the recent case of *Fulton* v. *Hecht*, 580 F.2d 1243 (5th Cir. 1978), the Fifth Circuit reaffirmed the Commission's approach in *LaPeyre*. There, a South Florida dog-track operation, the alleged monopolist, refused to renew its racing contract with the plaintiff, who raised and raced greyhounds. Plaintiff claimed this action was taken because of unfavorable testimony he had given about defendant before the state board which regulated dog tracks. Sidestepping the issue of whether defendant possessed monopoly power, the court held that plaintiff had failed to make out a conventional Section 2 case "because he did not present any evidence that [defendant] used its power to enhance or maintain its position." *Id.* at 1247. The court then moved to plaintiff's alternative claim that under Section 2 "a monopolist has a duty to deal fairly with anyone who seeks to compete in an adjacent market." *Id.* The court held that defendant had no such duty. But it said:

> This is not to say that a monopolist's behavior having inevitable anticompetitive or other undesirable economic effects solely in an adjacent market can never violate any of the antitrust statutes. E.g., this court has held that § 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45, prohibits a monopolist from discriminating between buyers in the price he charges for his product. See *LaPeyre* v. *FTC*, 366 F. 2d 117 (5th Cir. 1966). Thus, under §5 of the FTC Act, a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an [40]adjacent market. Such a duty is no help to the instant plaintiff because his action is based on § 2 of the Sherman Act, and there is no private cause of action for violation of the FTC Act. *Id.* at 1249 fn.

See also Laitrim Corp. v. *King Crab, Inc.*, 244 F. Supp. 9 (D. Al. 1965); *cf. Peelers Co.* v. *Wendt*, 260 F. Supp. 193 (W.D. Wash. 1966).

Aside from the precedent cited above, there are collateral lines of authority which support imposition of some duty on a monopolist not to discriminate in dealing with persons who compete with one another in an adjacent market. Such a duty—which we will call a duty not to be "arbitrary"[36]—would be consistent with common law principles of fair dealing, such as those that apply to innkeepers, common carriers, and businesses affected with a public interest. *See* Sullivan, *Antitrust*, § 48, at p. 125 (West 1977). Judge Learned Hand once stated that "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." *United States* v. *Associated Press*, 52 F. Supp. 362, 373 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

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[36] *See* pages 44-45, *infra*, for a discussion of what we mean by the term arbitrary.

Imposing on a monopolist a duty—whether the standard is not to be unreasonable or not to be arbitrary—would also be consistent with action taken by the Supreme Court in important joint venture cases. In *United States* v. *Terminal Railroad Ass'n.*, 224 U.S. 383 (1912), several railroad companies had joined together to form the Terminal Railroad Association, which had gained control of all the rail routes of access to St. Louis. These "proprietary companies" agreed among themselves that unanimous consent would be required before a non-member railroad could be admitted to the Association or use the facilities. The Supreme Court held that the combination of all the routes of access under the exclusive ownership and control of less than all the railroad companies needing to use them constituted a violation of both Section 1 and Section 2 of the Sherman Act. Significantly, from the point of view of the case now before us, the Court ordered the Association to provide that all other railroads could become members of the Association, or use the Association's facilities, on reasonable and non-discriminatory terms. In *Associated Press* v. *United States*, *supra*, more than 1200 newspapers belonged to Associated Press ("AP"), a cooperative [41]association engaged in the collection, assembly, and dissemination of news. AP By-Laws prohibited all members from selling news to non-members, and granted each member power to block its non-member competitors from membership. The Court found that, although AP did not have a monopoly in its field, it was the largest news agency and denial of an opportunity to acquire news from it could be a significant disadvantage to "the publication of competitive newspapers." *Id.* at 13. The Court held that the restrictive By-Laws constituted a violation of Section 1 and entered an order stating that AP could not maintain By-Laws which permitted discrimination against applicants-for-membership who competed with existing members.

Those two cases are different from the case at hand in that they both involved an association of horizontal competitors who controlled a competitively important facility that "unassociated" competitors lacked and could not reproduce. *See* III Areeda and Turner, *Antitrust Law*, § 729g, at p. 243 (Little, Brown & Co. 1978). Nevertheless, the Court's orders demonstrate a concern that "scarce resources" be made available on a non-discriminatory basis. *Cf. Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). And if a duty not to discriminate unreasonably can be imposed on a joint venture conferring significant competitive advantages on its competitor-members, it is a small step to impose a duty not to be arbitrary on a monopolist who controls a scarce resource which cannot be duplicated by the joint efforts of companies seeking to use it.

Policy reasons for imposing a duty not to be arbitrary are compelling. Since we are dealing with a monopolist, the victimized customer or supplier cannot turn to an alternative source. Thus, a refusal by the monopolist to deal, or to deal otherwise than on discriminatory terms, essentially means the disfavored person suffers a competitive disadvantage which cannot be avoided. Such a result should not come about from an arbitrary decision by the monopolist. Moreover, arbitrary decisions may affect resource allocation in the adjacent market—that is, favor one competitor over another for reasons entirely divorced from considerations of efficiency or willingness of the disfavored seller to compete effectively. *See* Sullivan, *supra*, § 48, at p. 131. It is inconsistent with the fundamental goals of antitrust to permit such results if they can be avoided at acceptable costs. [42]

Formidable policy reasons have been advanced in opposition to the existence of such a duty. For example, it has been argued that banning arbitrary refusals to deal by monopolists would place antitrust enforcers in the undesirable position of determining the legality of refusals based on social, political, or even personal reasons. The example has been given of a monopoly movie theater which refuses to admit men with long hair, or a monopoly newspaper which refuses to publish advertising from cigarette manufacturers. *See* III Areeda and Turner, *supra*, § 736a, pp. 270–71. But under the standard we are enunciating now, neither of these examples would trigger antitrust scrutiny. Presumably there is no competition among persons who attend movies, and therefore arbitrarily excluding one group of patrons or another would not inflict a competitive injury. Similarly, refusing to publish ads for all cigarette companies would not place any of those companies at a disadvantage *vis-a-vis* a competitor. Certainly, it would be unwise to offer antitrust enforcement as a knight errant, bound to right every wrong inflicted by dominant companies; the goal here rather is to protect a *competitive* process by outlawing arbitrary monopoly behavior that inflicts a competitive injury.[37] But even when it is so limited, it is probably true that imposing a duty not to be arbitrary will require antitrust enforcers to occasionally pass on the legality of refusals based on social, political, or personal reasons.[38] However, notions of fair dealing are part of the inheritance antitrust law received from [43]the common law.[39] *Cf. United States* v. *Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943); Sullivan, *supra*, § 48, at p. 125. And this inheritance should not be shunned because it may produce hard cases.

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[37] The result here may be inconsistent to some extent with the theory of the *Colgate* doctrine, *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). In *Colgate* the court recognized the right of a trader "freely to exercise his own independent discretion as to parties with whom he will deal", at least in the absence of any purpose to create or maintain a monopoly. Here there is no such purpose, but we believe the philosophy of *Colgate* must give way to a limited extent where the business judgment is exercised by a monopolist in an arbitrary way.

Another reason often advanced in opposition to imposing a duty not to be arbitrary is that refusals to deal at all will not be the only question presented; rather, there will be questions concerning discriminatory terms which do not amount to a total refusal to deal. Such questions, it is argued, will inevitably lead courts into complex issues regarding what constitutes a reasonable price, whether terms are really comparable, and so on. Thus, an order directing a seller to deal on reasonable terms, or to not be arbitrary, will lead a court or agency to specify what constitutes reasonable terms and to police compliance over time—a regulatory role that courts have wisely shunned whenever possible. Since these problems are seen as unavoidable, it is urged that this problem should be left to the legislature.

We agree that it is generally undesirable for courts to place themselves in a position of monitoring the pricing activities or other variable, on-going activities of a monopolist. But we are reviewing a refusal by Donnelley to list certain connecting flight information, and to group the listings of all carriers together—matters not involving pricing questions at all. As is demonstrated in the application of the law to the facts of this case, *infra*, we feel comfortable scrutinizing Donnelley's conduct on the two challenged issues to determine whether the policies were arbitrary, and drafting an order which will not involve [44]unusual supervisory burdens.[40] In addition, we feel that this is not necessarily an area that should be left to the legislature. There are too many varied bottleneck monopolies in this country to expect that the problem would lend itself to resolution through a single sweeping formulation. On the contrary, this is a prime area for the case-by-case approach embodied in the common law and carried out by adjudicative tribunals. Moreover, by commanding the Commission to seek out and stop "unfair methods of competition", the legislature has already spoken. That standard, like the common law, was meant to be flexible and capable of application to new and changing economic conditions.

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[38] Consider, for example, a monopoly newspaper refusing to take ads from a particular cigarette company because of the style of prior ads or the political views of its president.

[39] Indeed, "fairness" is the express standard mandated by Congress in Section 5 of the FTC Act. Since this proceeding was instituted under Section 5, we have no occasion to decide whether any similar duty not to be arbitrary can be imposed on monopolists under Section 2. We see no persuasive reason, however, why a similar duty would not arise under the Sherman Act.

[40] It is important to note the qualifying conditions that apply here. As already noted, the arbitrary action by a monopolist must cause a competitive injury, and the doctrine is more easily applied where it does not put the court in an on-going regulatory role. In addition, this is not a case where a seller is attempting to go out of business and the court is asked to mandate continued operations; here it's clear that the OAG will continue to publish and the only issue involves its format. Finally, an order mandating a certain format in publication would not require the OAG to increase its capacity significantly or incur other major expenses. There, too, a court might be reluctant to act since it could not guarantee the monopolist a return on investment necessary to expand capacity or make major changes in operations. *See* III Areeda & Turner, *supra*, § 729g at p. 243 n.25.

We come finally to the question of how to define the term "arbitrary." In spite of the broad language in *LaPeyre* and *Fulton* v. *Hecht*, *supra*, we do not suggest that a monopolist must always deal on precisely equal terms or that a court or the Commission should measure the reasonableness of a monopolist's conduct *vis-a-vis* those with whom it deals against an inflexible standard. Rather, we should limit ourselves to a concern with conduct which results in a substantial injury to competition and lacks substantial business justification. In examining the question of business justifications, the economic self interest of the monopolist would be the major but not the exclusive consideration. Where there is little justification for a business policy, the antitrust laws can require that the monopolist take into account the effect on competition of its actions in the line of commerce made up of its customers, suppliers, or others wishing to deal with it. [45]

Of course, we cannot in this opinion anticipate and react to the multitude of fact situations that could arise. Our application of this standard to the facts of Donnelley's publication policies should provide some indication of what we mean by "arbitrary".

2. Applying the legal standard to Donnelley's acts.

We believe Donnelley's failure to list connecting flight information for commuter carriers was arbitrary and in violation of the standard set out above.[41] The discussion at pages 7-9, *supra*, demonstrates that the failure to list this information caused commuter air carriers significant competitive injury. On appeal, Donnelley has offered no explanation whatsoever for its refusal to list commuter connecting flights, and we can conceive of no reason, particularly in light of the fact that Donnelley changed its policy on this score with apparent ease and no ill effects after the complaint in this case was issued.

From documents introduced at the hearing, it appears that Donnelley viewed the issue of listing commuter and intra-state connecting flights as being tied to the issue of merging the listings of all three classes of carriers (*see*, *e.g.*, CX 11; CX 12B), and decided not to list such connecting flights (until 1976, at least) because it had decided not to merge the listings of all three classes of carriers. But in an internal Donnelley report prepared in 1972, it was revealed that commuter and intra-state connections could be included in the OAG in separate groupings for only $6000. Yet Donnelley did not change its format to include them until December 1976, eight months after this suit was brought. Furthermore, as we said before, Donnelley has made no mention [46]of any adverse effects resulting from the 1976 change in this policy. We hold that Donnelley's failure to list commuter connecting flights was arbitrary, caused commuter air carriers significant competitive injury, and constituted a violation of Section 5.[42]

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[41] As we said at p. 7 fn.4, *supra*, there was no showing that Donnelley's failure to list intra-state connecting flights caused those carriers any competitive injury, and therefore we do not hold that such failure constituted a violation of Section 5.

Donnelley's failure to merge the listings of non-certificated carriers with those of certificated carriers has also caused significant competitive injury to non-certificated carriers. This is so because most users of the OAG read the listings of flights between a city-pair from top to bottom and pick the first convenient flight; therefore, listing the flights of certificated carriers before the flights of non-certificated carriers often results in users picking a certificated flight without even looking at the listings for non-certificated carriers. *See* pages 13–17, *supra.* [47]

We cannot say, however, that the failure to merge the listings of all three classes of carriers was arbitrary. Donnelley states that its separate listing policy is justified because each of the three classes of carriers has a different legal status and provides a fundamentally different level of service. They argue that separate listing is therefore required to put the OAG's users on notice as to what level of service is being offered in connection with a particular flight. In rebuttal, complaint counsel established that the differences between the three classes of carriers are less extreme than Donnelley claimed. *See* pages 12–17, *supra.* Complaint counsel also showed that Donnelley has been less than perfectly pure in carrying out its separate listing policy, as it lists the flights of commuter replacement carriers and some commuter-type foreign air carriers with the flights of certificated carriers. *See* pages 17–20, *supra.*

On balance, we find that Donnelley had a substantial business justification for its separate listing policy. The decision not to merge commuters' listings was based on Donnelley's belief that certificated carriers provide more reliable flight information for listing in the OAG, and are generally faster, safer, and more comfortable than commuter carriers. And with respect to intra-state carriers, it appears that the legal requirement that these carriers not accept passengers or baggage engaged in an interstate journey led Donnelley officials to conclude that intra-state carriers should be carefully noted in the OAG as being different from other carriers. While we might have decided that it would be better and fairer to combine the listings of all three classes of carriers and denote commuter and intra-state flights by the use of some symbol, we cannot say that the different course Donnelley chose was so completely lacking in reasoned support as to be arbitrary.

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[42] On appeal, Donnelley argues that no order should be entered regarding the publishing of connecting flight information, because it began to publish such information in 1976 and there is no evidence that it is likely to stop. But we do not believe that the discontinuance of a practice eight months after a complaint is issued against it is anything more than a reaction to the suit. *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960). Accordingly, we have entered an order provision regarding the listing of connecting flight information. And although we do not hold that Donnelley's failure to publish intra-state connections violated Section 5 (*see* page 7 fn.4, *supra*), the order in this case prohibits Donnelley from arbitrarily discriminating against any carrier or class of carriers in the listing of connecting flight information. We believe it is reasonable to extend the order to all air carriers because, even though complaint counsel did not attempt to show that intra-state carriers had been injured by not having their connecting flights listed, it is reasonable to assume that a failure to list the connecting flights of any class of air carrier would result in a competitive injury to that class. Extending the order in this way will serve to prevent future violations similar to those found here and is justified under our wide discretion to fashion "relief to restrain other like or related unlawful acts." *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959).

F. *The First Amendment.*

The order entered by the ALJ in this case prohibited Donnelley from discriminating among the three classes of carriers in the order of listing of their flights or in the publication of connecting flight information. On appeal, Donnelley asserts that both of these prohibitions abridge their First Amendment rights and are unconstitutional. Since we reverse the ALJ's finding that Donnelley's failure to merge the listings of all three classes of carriers was in violation of the antitrust laws, we concern ourselves only with Donnelley's claim regarding connecting flight listings. And we reject Donnelley's contention that an order provision which relates to the content of the OAG is unconstitutional. [48]

Donnelley has engaged in conduct which violates Section 5 of the FTC Act, 15 U.S.C. 45. Given this fact, we are required to devise "a reasonable method of eliminating the consequences of the illegal conduct." *Nat'l Soc'y of Professional Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978). The only conceivable method of remedying the consequences of Donnelley's prior illegal conduct is to order them not to discriminate arbitrarily against any air carrier or class of air carriers in the listing of connecting flights. The effect of this order may be to require Donnelley to publish information in the OAG which it might otherwise choose not to (as, indeed, it has in the past); but that does not mean that the FTC, as an arm of the state, has impermissibly intruded on Donnelley's First Amendment rights. In *Nat'l Soc'y of Professional Eng'rs, supra*, the district court had found the Society guilty of a violation of the antitrust laws for promulgating an ethical canon which prohibited competitive bidding; accordingly, it entered an order prohibiting the Society from adopting any policy statement, guideline, etc., which stated or implied that competitive bidding is unethical. The Society argued before the Supreme Court that this order abridged its First Amendment rights. The Court dismissed this argument in short order:

> Having found the society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does "not make it . . . impossible ever to enforce laws against agreements in restraint of trade. . . ." In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may infringe upon rights that would otherwise be constitutionally protected, but those protections do not prevent [49]it from remedying the antitrust violations. *Id.* at 697 (citations omitted).

Cf. Lorain Journal v. *United States*, 342 U.S. 143, 155–56 (1951). We believe this language is dispositive of the First Amendment issue raised by Donnelley.

In reaching this conclusion, we reject Donnelley's contention that *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is controlling. In that case the Court was required to pass upon the constitutionality of a Florida statute requiring any newspaper which assailed the personal character or official record of any candidate for political office to print free of cost any reply the candidate might wish to make. The Court found the statute violative of the First Amendment, but the language it used in doing so left it clear that the Court was talking about "political" speech and the special role of newspapers in the dissemination of such speech:

> [U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate. . . . A newspaper is more than a passive receptacle or conduit for news, comment and advertising. *Id.* at 257–58.

The OAG, by contrast, is not a newspaper, and it is *not even* a "passive receptacle or conduit for news, comment, and advertising"—it is a passive receptacle only for "commercial" speech.[43] Of course, the fact that the OAG [50]is not a newspaper and contains only commercial speech does not mean that it is not entitled to First Amendment protection. *See, e.g., Virginia State Bd. of Pharmacy, supra.; Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). But it does mean that it is not entitled to the same high level of protection that is applicable to other forms of speech. *See Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman* v. *Rogers* 47 U.S.L.W. 4751 (S.Ct. Feb. 20, 1979). We believe that the commercial speech in question in this case is radically different from the political speech involved in *Tornillo*, and that that case is therefore not controlling.

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[43] Though not all of the listings contained in the OAG are paid for by the carrier involved, we believe the information contained therein still qualifies as commercial speech because it is information as to who is offering what service and at what price. *See Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Furthermore, the information contained in the OAG serves as the basis on which millions of private economic decisions are made, which in the aggregate have a substantial effect on how certain resources are allocated. *See id.*

CONCURRING AND DISSENTING OPINION OF COMMISSIONER BAILEY

I concur in this Opinion of the Commission with one exception: based on the legal standard set forth and a practical examination of the record evidence, I would go further than the majority and order Reuben Donnelley to merge all listings of competing certificated, commuter and intrastate flights.

The majority Opinion poses the policy issue presented in this matter to be ". . . whether antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, but which are arbitrary and result in competitive injury to customers, suppliers, or others vulnerable to its monopoly power."[1]

The majority's answer, in which I concur, is: antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, if they are "arbitrary," which is defined as "conduct which results in a substantial injury to competition and lacks substantial business justification."[2]

Respondent was found to engage in two practices which inflicted substantial competitive injury. Its failure to list the connecting flights of commuter airlines was found to deprive the commuters of "a primary marketing tool with respect to a large portion of their business,"[3] and to afford the certificated carriers a "significant competitive advantage."[4] Likewise, respondent's failure to merge the listings of competing certificated, commuter and intrastate flights was found to cause "significant competitive injury to non-certificated carriers."[5] [2]

The majority found that respondent's failure to list commuter connecting flights was arbitrary, i.e. a practice inflicting substantial competitive injury and lacking in substantial business justification. I agree, noting that respondent offered no justification at all for this practice.

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[1] Slip Opinion at 2.

[2] Slip Opinion at 44.

[3] Slip Opinion at 9.

[4] Slip Opinion at 8.

[5] Slip Opinion at 46.

The majority found that respondent's failure to merge competing certificated, commuter and intrastate flights was not arbitrary because . . . "on balance" it finds that "Donnelley had a substantial business justification for its separate listing policy."[6]

Thus the majority has found a lack of substantial business justification in a situation where no justification at all was advanced. In order therefore to explore the meaning of the phrase "substantial business justification" beyond such a situation, it is necessary to examine respondent's reasons, which the majority finds to be "substantial," for not merging the listings of competing certificated, commuter and intrastate carriers.

The Opinion states:

> The decision not to merge commuters' listings was based on Donnelley's belief that certificated carriers provide more reliable flight information for listing in the OAG, and are generally faster, safer, and more comfortable than commuter carriers. And with respect to intra-state carriers, it appears that the legal requirement that these carriers not accept passengers or baggage engaged in an interstate journey led Donnelley officials to conclude that the intra-state carriers should be carefully noted in the OAG as being different from other carriers.[7]

It is unclear to me which one of these arguments or whether all in combination constitute the "substantial business justification" found by the majority. I therefore examine them separately.

1. *Certificated air carriers are generally faster and more comfortable than non-certificated carriers.* It is true that CAB regulations limit commuter air carriers to planes which have a capacity of no more than thirty seats and a "maximum payload" of 7500 pounds.[8] Such planes usually fly at speeds of 200 to 300 miles per hour.[9] As a result of CAB regulations, then, commuter carriers, generally, are smaller and do not fly as fast as certificated carriers. It is also true, as the ALJ noted, that commuter carriers normally fly routes averaging only about 75 miles, and that therefore "comfort" factors may not be as important to travelers as other factors such as departure and arrival times.[10] There [3]are intrastate carriers which, generally, fly planes of equivalent size at equivalent speeds as certificated carriers.[11] Respondent now discloses in the OAG through the use of symbols such things as departure and arrival time (which implicitly discloses speed); the

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[6] Slip Opinion at 47.
[7] Slip Opinion at 47.
[8] Slip Opinion at 17–14 CFR 298.
[9] Initial Decision, at p. 22, Finding 71.
[10] Initial Decision, at pp. 25–26, Findings 77, 78.
[11] Initial Decision, at p. 25, Findings 72–76.

number of intermediate stops, the type of aircraft, and the availability of meals or snacks (which discloses comfort factors). The relatively sophisticated consumers who use the OAG are thus apprised of speed and comfort factors, whether the flights are merged or separately listed.

2. *Certificated carriers are generally safer than non-certificated carriers.* Two government-sponsored studies (RX 196, RX 563) show that the fatality rate per 100 million miles flown and per 100,000 departures is slightly higher for commuters than for certificated carriers. There is no safety comparison study of certificated and non-certificated carriers for the city pairs in which they compete yet it is obvious that the area of the country flown in, weather and the airports involved are major factors in air safety.[12] Though the validity of what safety evidence exists is contested, safety is plainly a major concern to air travelers. If the purpose of separate listings were to apprise travelers that a safety risk might be involved in dropping down from the first category to select a flight, it is conceivable that even the contested evidence provides a justification for respondent's listing practice. However, respondent does not list individual carriers on the basis of their safety records, nor does the OAG in any way suggest that safety is involved in the way carriers are listed. The OAG (RX 571) contains at least forty pages of prefatory material explaining the various listings and symbols used in the guide. Safety is not mentioned. Thus the relatively sophisticated consumers who use the OAG are not apprised of comparative safety factors, whether the flights are merged or separately listed.

3. *Certificated carriers provide more reliable flight information for listing in the OAG.* There are two questions here. The first is whether non-certificated carriers are less likely to fly scheduled flights listed in the OAG than are certificated carriers. The three studies of scheduling reliability in the record[13], two of which were prepared by respondent, reveal that certificated and commuter reliability in this sense is roughly equivalent. Indeed, when measured by consumer complaints filed with the CAB (CX 135), commuters come out ahead of certificated carriers. The evidence available in the record shows that in 1974 96% of scheduled commuter flights operated, which is "comparable with certificated carriers."[14] The second reliability question posed is whether commuters so often go out of business without notifying respondents that consumers are inconvenienced by the unreliability [4]of commuter listings in the OAG. There is ample evidence that small

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[12] Initial Decision, at p. 36, Transcript 2062–63, 2060.

[13] CX 186, CX 180, CX 187.

[14] Initial Decision, at p. 29, Finding 101.

commuter lines regularly enter and exit the market. However, testimony establishes that approximately 90 to 95% of passengers carried by commuters travel on 50 to 60 commuter lines, firms which respondent's own documents identify as stable.[15] In any event, respondent nowhere in the guide instructs users to be wary of any scheduling unreliability on the part of its separately listed non-certificated carriers or that the listings may no longer be valid. Thus the relatively sophisticated consumer who uses the OAG is not apprised of any "reliability" factor, whether the listings are merged or separated.

4. *Intrastate carriers are listed separately because of legal restrictions barring these carriers from accepting passengers or baggage involved in interstate journeys.* This legal restriction no longer exists.[16]

5. *The justifications considered as a group.* None of these reasons which Donnelley has advanced in justification of its separate listing practice seems to me substantial enough to justify the admittedly substantial anti-competitive effects of that practice. Neither do I believe that this is an instance in which these insubstantial reasons, when added together, become substantial. What Donnelley has shown, in sum, is that there may be some differences between a certificated and a non-certificated carrier: an intrastate carrier, while it may fly planes as fast and as comfortable as a certificated carrier, only flies intrastate; a commuter aircraft is generally smaller, flies at a slower speed and may not be as "comfortable" as a certificated carrier. It is also conceivable, though I am unpersuaded by the evidence in this record, that in city pairs where they compete (which is the only case in which the listings would be merged) certificated carriers are safer.

Even if I were to consider the differences in service, singly or in combination, to justify a substantial anti-competitive injury, respondent's failure to adhere to practices consistent with its own arguments undercuts their substantiality in my mind. Respondent lists any commuter serving as a "replacement" carrier for a certificated airline with the certificated carriers and denotes it by use of a symbol.[17] Significant numbers of foreign carriers, some of which fly no larger aircraft than commuters, are undocumented as being safer, are no more or less reliable, and surely are no more preferred by travelers, yet are listed with the certificated carriers.[18] Respondent also publishes the OAG international edition in which it merges all types of carriers engaged in foreign flights.[19] Respondent also supplies SCIP tapes, in

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[15] Transcript at 948, 2866; CX 135.

[16] Slip Opinion at 14, Note 11; Initial Decision, at p. 28, Finding 97.

[17] Slip Opinion at 19–20.

[18] Initial Decision, at pp. 12–13, 25, Findings 25–27, 73.

[19] Initial Decision, at p. 33, Finding 125.

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which it [5]apparently merges the listings, to twenty-five certificated carriers.[20]

In sum, then, I find myself in general agreement with the majority in this case, but would only go further on the question of merging the listings. The majority says:

> While we might have decided that it would be better and fairer to combine the listings of all three classes of carriers and denote commuter and intrastate flights by the use of some symbol, we cannot say that the different course Donnelley chose was so completely lacking in reasoned support as to be arbitrary.[21]

It is a very close question. But for the reasons outlined here, I would find Donnelley's separate listing practice to be arbitrary.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to affirm in part and reverse in part the Initial Decision:

It is ordered, That the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is entered:

I

It is ordered, That respondent The Reuben H. Donnelley Corporation, and its parent, subsidiaries, successors and assigns, officers, agents, representatives, employees, and any concern controlled by it (including joint ventures), directly or indirectly through any corporate or other device, in connection with the publication of the Official Airline Guide - North American Edition or any successor publication, shall forthwith cease and desist from failing to publish connecting flight listings for commuter air carriers pursuant to whatever guidelines govern the publication of connecting flight listings for certificated carriers. [2]

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[20] Initial Decision, at p. 33, Finding 124.

[21] Slip Opinion at 47.

II.

It is further ordered, That respondent The Reuben H. Donnelley Corporation, and its parent, subsidiaries, successors and assigns, officers, agents, representatives, employees, and any concern controlled by it (including joint ventures), directly or indirectly through any corporate or other device, in connection with the publication of the Official Airline Guide - North American Edition or any successor publication, shall forthwith cease and desist from otherwise arbitrarily discriminating against any air carrier or class of air carriers in the publication of connecting flight listings for air carriers providing scheduled passenger air transportation.

III.

It is further ordered, That respondent The Reuben H. Donnelley Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations growing out of this order.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Jan. 14, 1980

ORDER DIRECTING ISSUANCE OF COMPULSORY PROCESS

By order of November 13, 1979, the Commission directed Chief Judge Daniel Hanscom, Deputy Chief Judge Ernest Barnes, and Deputy Executive Director Barry Kefauver to file affidavits concerning the circumstances of former ALJ Harry R. Hinkes' retirement and the negotiations leading to the execution of a contract with Judge Hinkes. In that order, and in a letter sent the following day, the Commission further requested that Judge Hinkes file an affidavit concerning this matter. Judge Hanscom, Judge Barnes, and Mr. Kefauver have complied with the Commission order. Judge Hinkes has not responded to the Commission request.

For the reasons stated in its November 13, 1979 order, the Commission requires the evidence of Judge Hinkes. We accordingly determine, pursuant to Section 9 of the Federal Trade Commission Act, to require by subpoena the appearance of Judge Hinkes for purposes of responding to the questions posed to him in our letter of November 14, 1979. The General Counsel is hereby directed to prepare and issue such a subpoena, and to seek enforcement of it if necessary. Judge Hinkes shall be deemed to have complied with such subpoena if he submits, within 20 days of the date of service, the affidavit requested by our letter of November 14.

Upon receipt of Judge Hinkes' affidavit or upon the taking of his statement, the Commission intends to invite the views of the parties as to the additional information, if any, that is necessary for the resolution of this matter.

It is so ordered.

Commissioner Pitofsky not participating.

IN THE MATTER OF

W.R. GRACE & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3002. Complaint, Jan. 14, 1980—Decision, Jan. 14, 1980

This consent order requires, among other things, a New York City operator of three home improvement store chains to divest the San Jose home improvement stores within one year from the effective date of the order. Should the firm reacquire any or all of the stores as a result of the enforcement of a form of security interest, it is required to divest the reacquired assets within six months of the reacquisition.

Appearances

For the Commission: *Allee A. Ramadhan* and *Gary D. Kennedy.*

For the respondent: *James T. Halverson, Sherman & Sterling*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that W.R. Grace & Co. ("Grace"), a corporation subject to the jurisdiction of the Commission, has acquired the stock of Daylin, Inc. ("Daylin"), a corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. Definitions

1. For the purpose of this complaint the following definitions shall apply:

(a) "Home Improvement Store" means a retail establishment primarily engaged in selling hardware and tools, wood and non-wood building materials, plumbing and electrical equipment, paint and decorating materials, and lawn and garden tools and supplies in some significant respect to do-it-yourself customers for the building, maintenance, remodeling or decorating of gardens, homes, and apartments.

(b) "San Jose Area" means the San Jose, California Standard Metropolitan Statistical Area, as those terms are defined (and that area designated) by the U.S. Bureau of the Census.

II. W.R. Grace & Co.

2. Grace is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut with its principal offices at Grace Plaza, 1114 Avenue of the Americas, New York, New York.

3. Grace is an international chemical company with interests in: (a) natural resources, (b) industrial specialty chemicals, and (c) consumer operations.

4. As part of Grace's consumer operations, Grace operates three chains of home improvement stores: Channel Companies, Inc., a subsidiary operating such stores in New Jersey, New York, Connecticut, Delaware, and Pennsylvania; Handy City, a division operating such stores in the Southeastern United States; and Orchard Supply Building Co., a division operating such stores in the San Jose Area.

5. In the year ending December 31, 1977, Grace had total assets of $1,374,600,000 and sales and operating revenues of $3,976,233,000, which generated a net income of $140,480,000. In that year, Grace home improvement stores had estimated sales of $164,500,000. In the year ending December 31, 1978, Grace home improvement stores had estimated sales of $200,000,000.

III. Daylin, Inc.

6. Prior to March 21, 1979, Daylin was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices at 10960 Wilshire Boulevard, Los Angeles, California. On March 21, 1979, Grace acquired Daylin, and it is presently being operated as a subsidiary of Grace.

7. At the time of its acquisition, Daylin had interests in three areas: (a) health services and products, (b) apparel specialty shops, and (c) home improvement stores (operated by its Handy Dan subsidiary under the name "Handy Dan" or under the name "Angels.")

8. The Handy Dan subsidiary operated home improvement stores in the San Jose Area.

9. In the fiscal year ending September 3, 1978, Daylin had total assets of $190,261,000 and net sales and operating revenues of $333,400,000, which generated a net income of $9,552,000. In that year, Daylin home improvement stores had estimated sales of $190,000,000.

IV. Jurisdiction

10. At all times relevant herein, Grace and Daylin have been engaged in the ownership or operation of home improvement stores in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and the businesses of Grace and Daylin are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. Tender Offer Notice

11. On January 4, 1979, Grace announced its intention to make a tender offer to purchase the outstanding common stock of Daylin at a total price of $129,067,620. The acquisition was consummated on March 21, 1979.

VI. Trade and Commerce

12. The relevant line of commerce is retail store sales in the home improvement store business.

13. Prior to March 21, 1979, Grace and Daylin were actual competitors within certain local trade areas surrounding each Grace or Daylin home improvement store located within the San Jose Area.

VII. Effects

14. The effects of the acquisition of Daylin by Grace may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Grace and Daylin in the home improvement store business in the San Jose Area will be eliminated;

(b) actual competition between competitors generally in the home improvement store business in the San Jose Area may be lessened;

(c) concentration in the home improvement store business in the San Jose Area may be increased and the possibilities for eventual deconcentration may be diminished; and

(d) mergers or acquisitions between other home improvement stores may be fostered, thus causing a further substantial lessening of competition in the home improvement store business.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of Daylin, Inc., a corporation, by respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent W.R. Grace & Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut with its principal offices at Grace Plaza, 1114 Avenue of the Americas, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this Order the following definitions shall apply:

1. "Grace" means W.R. Grace & Co., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut with its principal offices at Grace Plaza, 1114 Avenue of the Americas, New York, New York.

2. "Daylin" means Daylin, Inc., a corporation that prior to the time of its acquisition was organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices at 10960 Wilshire Boulevard, Los Angeles, California.

3. "San Jose home improvement stores" mean the following home improvement stores that were owned by Daylin and acquired by Grace:

(a) 1975 Story Road
San Jose, California

(b) 865 Blossom Hill Road
San Jose, California

(c) 761 E. El Camino Real
Sunnyvale, California

(d) 1750 S. Bascom
Campbell, California

4. "Person" means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, or other business or legal entity.

5. "Home improvement store" means a retail establishment primarily engaged in selling hardware and tools, wood and non-wood building materials, plumbing and electrical equipment, paint and decorating materials, and lawn and garden tools and supplies in some significant respect to do-it-yourself customers for the building, maintenance, remodeling or decorating of gardens, homes, and apartments.

6. "Eligible person" means any person approved by the Commission.

I

It is ordered and directed that within one (1) year of the effective date of this consent order, Grace shall divest itself of all assets, title, interests, rights, and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, equipment, inventory, and other property of whatever description of the San Jose home improvement stores subject to the terms and provisions of this consent order. Divestiture may be accomplished by offering the San Jose home improvement stores either separately or jointly.

II

It is further ordered, That divestiture shall be made only to an eligible person and shall be in a manner which preserves the assets and business of the San Jose home improvement stores as going concerns and fully effective competitors.

III

It is further ordered, That pending divestiture required by this consent order, Grace shall not cause or permit any deterioration of the assets or business specified in Paragraph I of this consent order in a manner that impairs the marketability of any such assets or business; *provided, however,* that upon application to the Commission demonstrating good cause for ceasing to operate one or more of the San Jose home improvement stores, and upon approval by the Commission, Grace may cease to operate said home improvement store or stores.

IV

It is further ordered, That the divestiture ordered and directed by this consent order shall be made in good faith and shall be absolute and unqualified; *provided, however,* that an acquirer may give and Grace may accept and enforce any bona fide lien, mortagage, deed of trust or other form of security on all or any portion of any one or more of the San Jose home improvement stores. If a security interest is accepted, in no event should such security interest be interpreted to mean that Grace has a right to participate in the operation or management of such stores. In the event that Grace as a result of the enforcement of any bona fide lien, mortgage, deed of trust or other form of security interest reacquires possession of any one or all of the San Jose home improvement stores, then Grace shall divest the reacquired assets in accordance with the terms of this consent order within six (6) months of the reacquisition.

V

It is further ordered, That Grace shall within ninety (90) days from the effective date of this consent order and every ninety (90) days thereafter until divestiture is completed submit in writing to the Commission a report setting forth in detail the manner and form in which proposed respondent intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required.

VI

It is further ordered, That Grace notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance with the obligations arising out of this consent order.

IN THE MATTER OF

MARKET DEVELOPMENT CORPORATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9067. Complaint, December 19, 1975—Final Order, January 15, 1980

This order dismisses the complaint against Juanita Anderson, and requires a Chicago, Ill. mail order house and two corporate officers, among other things, to cease making false or misleading representations to obtain sales or prospects, and misrepresenting the nature of their business and goods, and the value and costs of merchandise and services. The order also bars the firm from failing to deliver goods or services within a reasonable time; and from misrepresenting that it is conducting a contest, or that recipients of its mailings are winners. If a warrantee is offered for a product or service, the terms, conditions and limitations of the warrantee must be clearly disclosed and obligations under the warrantee promptly fulfilled. The firm is additionally required to respond to written customer inquiries within seven working days and maintain specified records for three years.

Appearances

For the Commission: *Aaron H. Bulloff* and *Robert P. Weaver.*

For the respondents: *Lawrence C. Rubin, James S. Barber, Arvey, Hodes, Costello & Berman*, Chicago, Ill.; *Stein, Mitchell & Mezines*, Washington, D.C. for Columbia Research Corporation and Raymond Anderson; *Arnold Morelli, Bauer, Morelli & Heyd*, Cincinnati, Ohio for Juanita Anderson and Joseph Anderson.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Market Development Corporation, a corporation, and Raymond Anderson, Juanita Anderson, and Joseph Anderson, individually and as officers and/or directors and/or employees of said corporation, and Columbia Research Corporation, a corporation, and Raymond Anderson, [2]individually and as an officer and/or director of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Market Development Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its offices and principal places of business located at 5826 Hamilton Ave. and 3584 Hauck Road, in the City of Cincinnati, State of Ohio.

Respondent Columbia Research Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its offices and principal place of business located at 3762 West Devon, in the City of Chicago, State of Illinois.

Respondent Raymond Anderson is an individual and is or has been a director and President of both Market Development Corporation and Columbia Research Corporation, and is a resident of Ohio and/or Illinois. He takes or has taken part in the formulation, direction, and control of the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth.

Respondent Juanita Anderson is an individual and is or has been an employee of Market Development Corporation, and is a resident of Ohio. She takes or has taken part in the formulation, direction, and control of the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth.

Respondent Joseph Anderson is an individual and is or has been an employee of Market Development Corporation, and is a resident of Ohio. He takes or has taken part in [3]the formulation, direction, and control of the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth.

The aforementioned respondents cooperate and act, or have cooperated and acted together, in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have been engaged, and are now engaged, in the advertising, offering for sale, sale, and distribution of "vacations," sewing machines, and household and cosmetic products through magazines, newspapers, catalogues, and letters.

PAR. 3. In the course and conduct of their business, respondents now cause, and have caused, their products and supplies to be shipped from suppliers located outside the States of Ohio and Illinois to their offices in Ohio and Illinois, and when sold, to be shipped from Ohio and Illinois to purchasers located in other States and territories of the United States, and further, respondents now cause, and have caused, promotional material and advertisements to be prepared at their central offices in Ohio and Illinois and distributed therefrom to prospective purchasers located in other states; so that respondents have maintained a course of trade in said promotional material, advertisements, products, supplies, and material in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents now engage, and have engaged, in various sales schemes in order to promote the sale of "Treasure Chests," "Super Jackpot Packages," "gift boxes," "vacations," "sewing machines," and "Warm-O-Trivets." Respondents generally solicit, or have solicited, purchasers either through the use of mass mailings initially, or by mailings which follow up respondents' placement of "contest" or "sweepstakes" entry blanks in periodicals. The central thrust of these various schemes consists of informing [4]consumers, by mail, that they have either won a contest or are eligible as a result of a contest, or have otherwise been specially selected and are therefore eligible to receive "prizes" and/or "awards" and/or "gifts" and/or "bonuses" and/or free goods and services, which variously consist of a "Treasure Chest," "Super Jackpot Package," or "gift box" containing "full-sized nationally advertised household and cosmetic products," including one that allegedly retails for Twenty Dollars ($20.00); and/or a certificate good for a "free vacation" for two; and/or a discount certificate good for $100.00 towards the purchase price of a sewing machine that allegedly sells for $179.50; and/or a "Warm-O-Trivet." In truth and in fact, none of these goods and services are "prizes," "awards," "gifts," and/or "bonuses," nor are they free, but rather are simply goods and services offered by respondents at their normal retail selling prices of $15.00 for the "Treasure Chest," "Super Jackpot Package," or "gift box" and "vacation," and/or $79.50 for the sewing machine and Warm-O-Trivet.

PAR. 5. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, respondents are making, and have made, certain statements and representations in promotional material, magazine advertisements, and by other means, with respect to drawings, sales promotions, free goods, limitations to product offers, and merchandise prices.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are Exhibits A, B, C, D, and E, attached hereto and incorporated herein by reference.

PAR. 6. By and through the use of the aforementioned statements and representations, and by other written statements of similar import and meaning (not specifically set out herein), respondents represent, and have represented, directly or by implication, that:

1. Respondents have conducted and/or are conducting a contest.[5]

2. Respondents will award a specific number of products as contest prizes.

3. Respondents are in the business of market research and/or analysis.

4. Respondents have engaged, and/or are engaging, in incentive promotions and/or programs.

5. Respondents have co-sponsors.
6. Respondents represent other companies.
7. Recipients of respondents' offers have won a contest.
8. Recipients of respondents' offers have been specially selected.
9. Recipients of respondents' offers are entitled to "prizes," and/or "awards," and/or "winnings," and/or "gifts," and/or "bonuses," and/or "free" goods and services.
10. Recipients of respondents' offers are entitled to goods and services for only a registration, handling, and service charge.
11. Recipients of respondents' offers have a limited time to claim offered goods and services. [6]
12. Recipients of respondents' offers are receiving "once-in-a-lifetime" opportunities.
13. Recipients of respondents' offers are offered a "vacation" and that it is "free."
14. Recipients of respondents' offers are offered a choice of vacation times, locations, and accommodations.
15. The promotions entitled "Treasure Chest," "Super Jackpot Package," or "gift box" are unconnected to the sales promotion of any other product.
16. Three hundred forty thousand (340,000) families have accepted the offered goods and services.
17. The sewing machine offered by respondents is sold throughout the United States.
18. The sewing machine offered by respondents is serviced throughout the United States by or through respondents.
19. The sewing machine offered by respondents is used in home economics classes throughout the United States.
20. The sewing machine offered by respondents has a retail price of either $179.50 and/or $169.50. [7]
21. The sewing machine certificate offered by respondents is worth $100 toward the purchase of respondents' sewing machine.
22. The "Treasure Chest," "Super Jackpot Package," or "gift box" offered by respondents has a value of $30 or more.
23. The "vacation" coupons offered by respondents are worth $50 or $100.
24. The value of the total "Treasure Chest" offer is $250 to $300, or represents a savings of $200 or $250, and the value of the total "Jackpot" package is $500 or more.
25. The "Treasure Chest," "Super Jackpot Package," or "gift box" contains only "full-sized" products.
26. The "Treasure Chest" contains a "rare and very expensive cosmetic" with a retail value of $20.

27. Respondents will deliver ordered goods and services.

28. Respondents will bear the cost of delivery of their products.

29. Respondents guarantee goods and services on a money-back/satisfaction-guaranteed basis.

30. Respondents had a reasonable basis for making the aforesaid representations prior to making them. [8]

PAR. 7. In truth and in fact:

1. Respondents have not conducted, and do not conduct, contests. No *bona fide* contest or sweepstakes exists. Respondents' solicitation scheme is a systematic, money-making retail sales business transacted through mass mailings, and does not involve any elements of skill or chance. Their solicitations are intended only for the purpose of obtaining sales and/or leads.

2. Respondents fail to award all the "contest prizes" advertised.

3. Respondents do not engage in any market research and/or analysis. Their sole business is the sale of their "Treasure Chest" or "Super Jackpot Package" and sewing machine.

4. Respondents have not engaged, and are not engaged, in incentive programs and/or programs. Their sole business is the sale of their "Treasure Chest" or "Super Jackpot Package" and sewing machine.

5. Respondents have no co-sponsors for their promotions. Respondents retail the products they purchase from wholesalers of the products' manufacturers.

6. Respondents have at no time represented other companies in the sale of their products.

7. Recipients of respondents' solicitations are not winners, either in a sweepstakes or in a contest. At no time have respondents conducted a *bona fide* contest or sweepstakes. [9]

8. There is no special selection of solicitation recipients. Respondents mail to millions of prospective customers whose names respondents take from rented computer lists.

9. Recipients of respondents' offers are not entitled to any "prizes," and/or "awards," and/or "winnings," and/or "gifts," and/or "bonuses," and/or "free" goods and services. Recipients are only entitled to purchase them at a stated price.

10. The registration, handling, and service charge is nothing but respondents' full retail price for their goods and services.

11. No time limit exists within which recipients of respondents' solicitations must remit their money. Recipients may make their purchases after ten days after receiving the solicitation, and, in fact, many were subsequently solicited by respondent Market Development Corporation to purchase a second "Treasure Chest" or "vacation."

12. The promotion is not a once-in-a-lifetime opportunity. Actual

customers were solicited by respondent Market Development Corporation to purchase a second "Treasure Chest" or "vacation."

13. Purchasers of respondent Market Development Corporation's solicitation do not receive a vacation, but only lodging accommodations. Customers of corporate respondents Market Development Corporation and Columbia Research Corporation do not receive a "*free* vacation" because there are, in fact, no prizes, awards, or the like. Purchasers must buy the "Treasure Chest" to receive the "vacation" and must pay [**10**]for all other vacation expenses themselves, including all transportation and food expenses, and additional charges incurred during the "peak season."

14. Purchasers of the vacation do not have their choices of locations, lodging accommodations, and times. Actual arrangements may be different from purchasers' selections sent to respondents.

15. The Market Development Corporation "Treasure Chest" or "gift box" solicitation fails to state, or alternatively fails to state clearly and conspicuously, that the "vacation" is part of a land sales promotion and that the entire offer includes a follow-up sewing machine solicitation. The Columbia Research Corporation solicitation fails to state, or alternatively fails to state clearly and conspicuously, that the "vacation" is part of a land sales promotion or lodging accommodations sales promotion.

16. Respondents have inflated the number of families who have accepted their offer, and fail to disclose that their "satisfied" customers were induced to make purchases because of respondents' deceptive, and/or false, and/or unfair acts and practices.

17. Respondents' sewing machine is not sold throughout the United States except by mail from Cincinnati, Ohio, and at a few isolated retail outlets.

18. Respondents' sewing machine is serviced by or through respondents only in Cincinnati, Ohio.

19. Respondents' sewing machine is not used in home economics classes throughout the United States. [11]

20. Respondents' sewing machine does not have a $179.50 and/or $169.50 retail price. Currently, respondents' regular selling price of the sewing machine is $79.50, and prior to 1974, $69.50.

21. The discount certificate is worthless because respondents' regular selling price of the sewing machine is $79.50 or $69.50. Respondents artificially inflate the price of the sewing machine by $100.

22. Respondents artificially inflate the price of their "Treasure Chest," "Super Jackpot Package," or "gift box." Its value is significantly less than $30.

23. Respondents fail to disclose that in order to receive the benefits of the coupon book, one must make additional food and drink purchases, such as two-for-one deals. The only way the value of the coupon book may be realized is for purchasers of the "vacation" to spend the entire vacation time visiting the places of business represented in the coupons and spending additional money at each place of business.

24. The values of the goods and services offered by Market Development Corporation are significantly less than the $250-300 values ascribed to them by respondents' solicitations. If any "savings" are realized by dealing with respondents, those savings are significantly less than the $200-250 in savings claimed by respondents' solicitations. The values of the goods and services offered by the Columbia Research Corporation are significantly less than the $500 or more claimed for them by [12]respondents' solicitations. Respondents thus overstate the worth of the goods and services they offer.

25. The "Treasure Chest" does not always contain full-sized products or the products that respondents picture in their solicitation. The "Treasure Chest" may contain sample-sized products.

26. The "rare and very expensive cosmetic" is a perfume which does not sell anywhere at retail and costs respondents 37 cents a bottle to purchase.

27. Respondents fail, in many instances, to deliver ordered goods and services.

28. Respondents' customers bear the delivery costs of respondents' sewing machine.

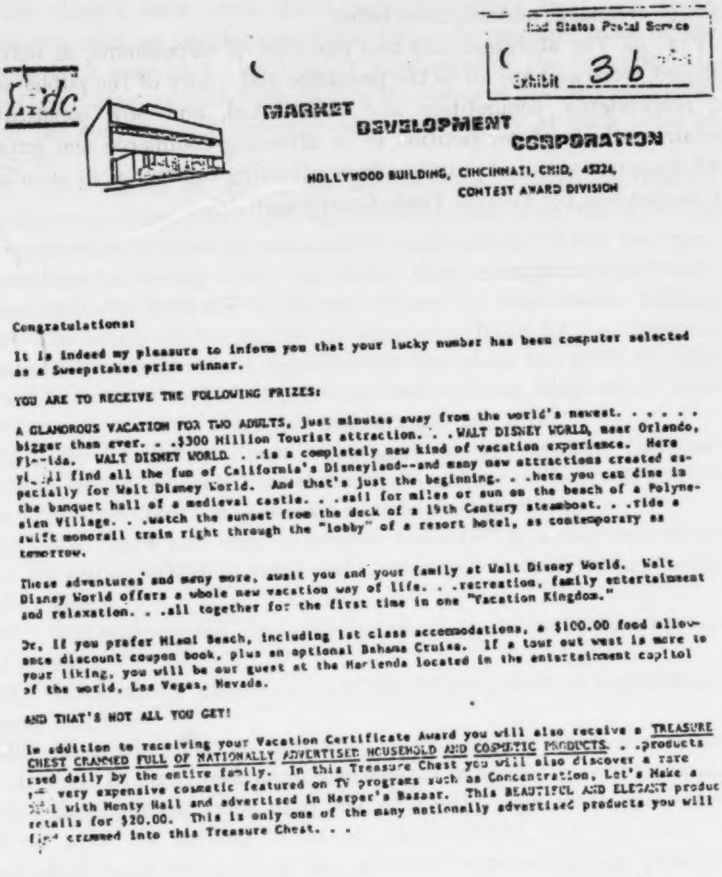
29. Respondents do not promptly refund monies if purchasers are dissatisfied. In many instances, respondents fail to make refunds at all.

30. Respondents knew that the aforesaid representations were untrue prior to making them or, alternatively, did not have a reasonable basis for making the aforesaid representations prior to making them. [13]

PAR. 8. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in or affecting commerce, with corporations, firms, and individuals in the sale of sewing machines, vacation packages, and cosmetic products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and/or into the purchase of substantial quantities of respondents' products by reason of such erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competition and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.



ted States Postal Service

Exhibit 3b

MARKET
DEVELOPMENT
CORPORATION

HOLLYWOOD BUILDING, CINCINNATI, OHIO, 45224,
CONTEST AWARD DIVISION

Congratulations!

It is indeed my pleasure to inform you that your lucky number has been computer selected
as a Sweepstakes prize winner.

YOU ARE TO RECEIVE THE FOLLOWING PRIZES:

A GLAMOROUS VACATION FOR TWO ADULTS, just minutes away from the world's newest. . . . . .
bigger than ever. . .$300 Million Tourist attraction. . .WALT DISNEY WORLD, near Orlando,
Florida. WALT DISNEY WORLD. . .is a completely new kind of vacation experience. Here
you'll find all the fun of California's Disneyland--and many new attractions created es-
pecially for Walt Disney World. And that's just the beginning. . .here you can dine in
the banquet hall of a medieval castle. . .sail for miles or sun on the beach of a Polyne-
sian Village. . .watch the sunset from the deck of a 19th Century steamboat. . .ride a
swift monorail train right through the "lobby" of a resort hotel, as contemporary as
tomorrow.

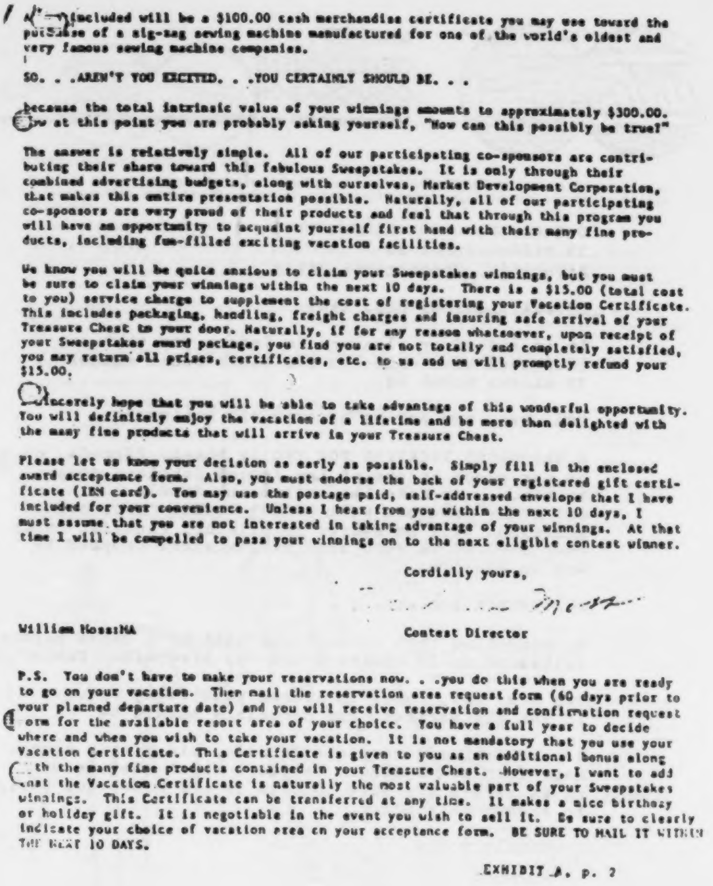
These adventures and many more, await you and your family at Walt Disney World. Walt
Disney World offers a whole new vacation way of life. . .recreation, family entertainment
and relaxation. . .all together for the first time in one "Vacation Kingdom."

Or, if you prefer Miami Beach, including 1st class accommodations, a $100.00 food allow-
ance discount coupon book, plus an optional Bahama Cruise. If a tour out west is more to
your liking, you will be our guest at the Hacienda located in the entertainment capitol
of the world, Las Vegas, Nevada.

AND THAT'S NOT ALL YOU GET!

In addition to receiving your Vacation Certificate Award you will also receive a TREASURE
CHEST CRAMMED FULL OF NATIONALLY ADVERTISED HOUSEHOLD AND COSMETIC PRODUCTS. . .products
used daily by the entire family. In this Treasure Chest you will also discover a rare
[illegible] very expensive cosmetic featured on TV programs such as Concentration, Let's Make a
Deal with Monty Hall and advertised in Harper's Bazaar. This BEAUTIFUL AND ELEGANT product
retails for $20.00. This is only one of the many nationally advertised products you will
find crammed into this Treasure Chest. . .

(over please) EXHIBIT A, p. 1



A[illegible] included will be a $100.00 cash merchandise certificate you may use toward the purchase of a zig-zag sewing machine manufactured for one of the world's oldest and very famous sewing machine companies.

SO. . .AREN'T YOU EXCITED. . .YOU CERTAINLY SHOULD BE. . .

because the total intrinsic value of your winnings amounts to approximately $300.00. Now at this point you are probably asking yourself, "How can this possibly be true?"

The answer is relatively simple. All of our participating co-sponsors are contributing their share toward this fabulous Sweepstakes. It is only through their combined advertising budgets, along with ourselves, Market Development Corporation, that makes this entire presentation possible. Naturally, all of our participating co-sponsors are very proud of their products and feel that through this program you will have an opportunity to acquaint yourself first hand with their many fine products, including fun-filled exciting vacation facilities.

We know you will be quite anxious to claim your Sweepstakes winnings, but you must be sure to claim your winnings within the next 10 days. There is a $15.00 (total cost to you) service charge to supplement the cost of registering your Vacation Certificate. This includes packaging, handling, freight charges and insuring safe arrival of your Treasure Chest to your door. Naturally, if for any reason whatsoever, upon receipt of your Sweepstakes award package, you find you are not totally and completely satisfied, you may return all prizes, certificates, etc. to us and we will promptly refund your $15.00.

[illegible]incerely hope that you will be able to take advantage of this wonderful opportunity. You will definitely enjoy the vacation of a lifetime and be more than delighted with the many fine products that will arrive in your Treasure Chest.

Please let us know your decision as early as possible. Simply fill in the enclosed award acceptance form. Also, you must endorse the back of your registered gift certificate (IBM card). You may use the postage paid, self-addressed envelope that I have included for your convenience. Unless I hear from you within the next 10 days, I must assume that you are not interested in taking advantage of your winnings. At that time I will be compelled to pass your winnings on to the next eligible contest winner.

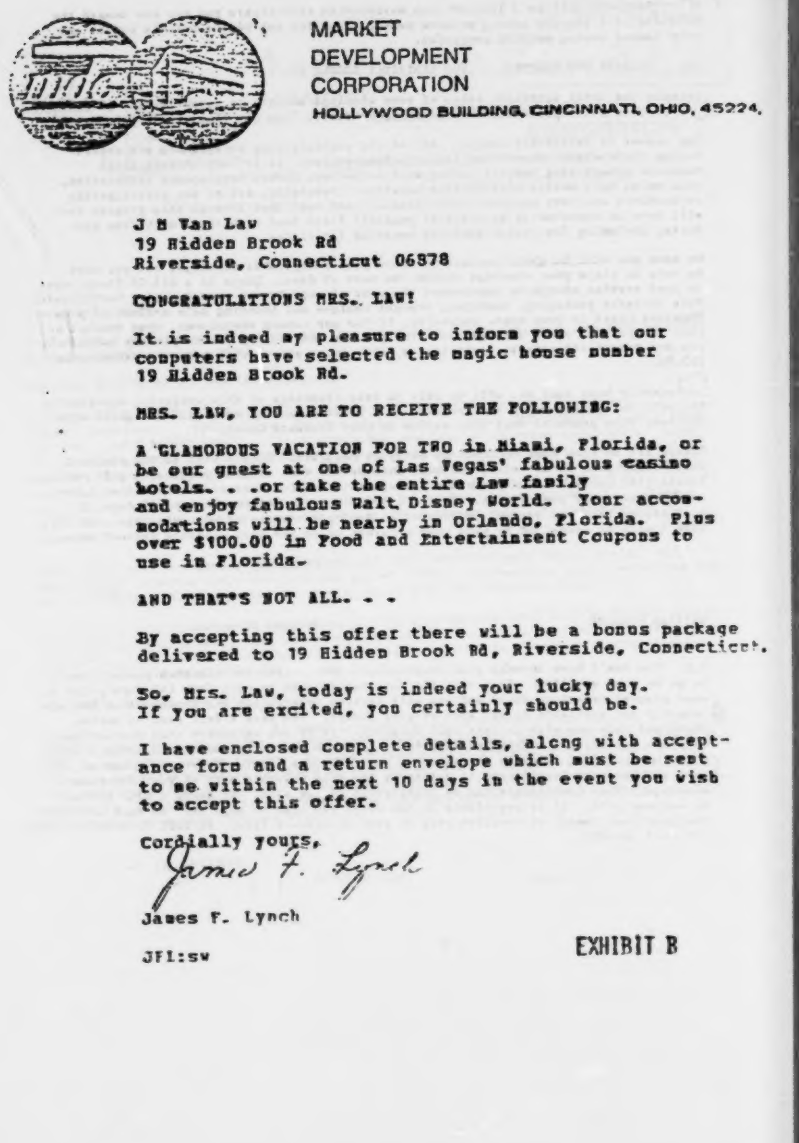
Cordially yours,

William Moss:MA

Contest Director

P.S. You don't have to make your reservations now. . .you do this when you are ready to go on your vacation. Then mail the reservation area request form (60 days prior to your planned departure date) and you will receive reservation and confirmation request form for the available resort area of your choice. You have a full year to decide where and when you wish to take your vacation. It is not mandatory that you use your Vacation Certificate. This Certificate is given to you as an additional bonus along with the many fine products contained in your Treasure Chest. However, I want to add that the Vacation Certificate is naturally the most valuable part of your Sweepstakes winnings. This Certificate can be transferred at any time. It makes a nice birthday or holiday gift. It is negotiable in the event you wish to sell it. Be sure to clearly indicate your choice of vacation area on your acceptance form. BE SURE TO MAIL IT WITHIN THE NEXT 10 DAYS.

EXHIBIT A, p. 2



MARKET
DEVELOPMENT
CORPORATION
HOLLYWOOD BUILDING, CINCINNATI, OHIO, 45224,

J B Van Law
19 Hidden Brook Rd
Riverside, Connecticut 06878

CONGRATULATIONS MRS. LAW!

It is indeed my pleasure to inform you that our computers have selected the magic house number 19 Hidden Brook Rd.

MRS. LAW, YOU ARE TO RECEIVE THE FOLLOWING:

A GLAMOROUS VACATION FOR TWO in Miami, Florida, or be our guest at one of Las Vegas' fabulous casino hotels. . .or take the entire Law family and enjoy fabulous Walt Disney World. Your accommodations will be nearby in Orlando, Florida. Plus over $100.00 in Food and Entertainment Coupons to use in Florida.

AND THAT'S NOT ALL. . .

By accepting this offer there will be a bonus package delivered to 19 Hidden Brook Rd, Riverside, Connectic

So, Mrs. Law, today is indeed your lucky day. If you are excited, you certainly should be.

I have enclosed complete details, along with acceptance form and a return envelope which must be sent to me within the next 10 days in the event you wish to accept this offer.

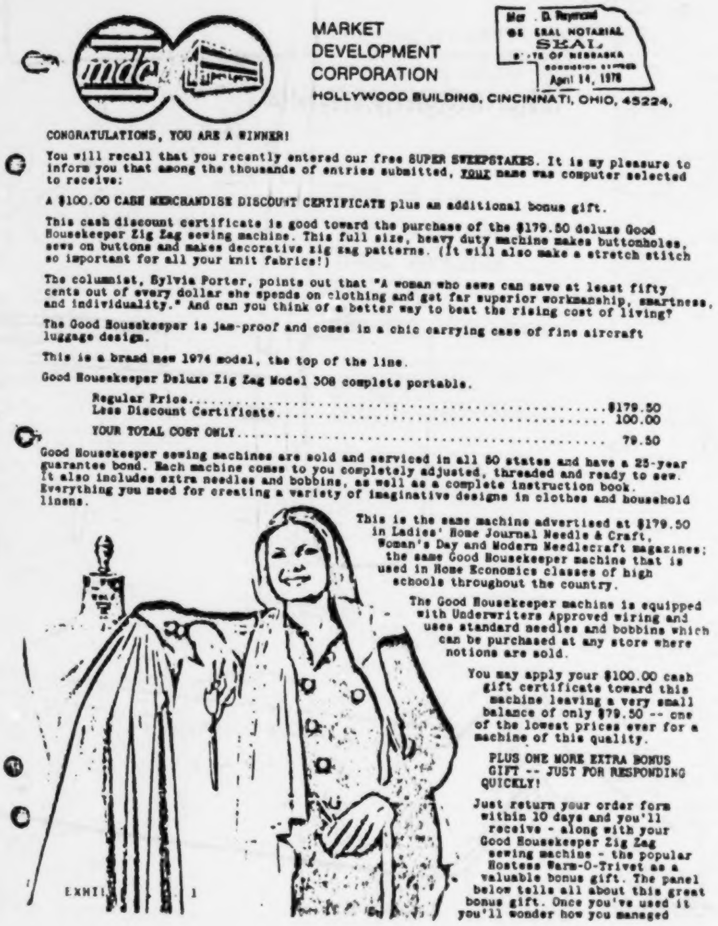
Cordially yours,

James F. Lynch

James F. Lynch

JFL:sw

EXHIBIT B



MARKET
DEVELOPMENT
CORPORATION
HOLLYWOOD BUILDING, CINCINNATI, OHIO, 45224,

April 14, 1978

CONGRATULATIONS, YOU ARE A WINNER!

You will recall that you recently entered our free SUPER SWEEPSTAKES. It is my pleasure to inform you that among the thousands of entries submitted, YOUR name was computer selected to receive:

A $100.00 CASH MERCHANDISE DISCOUNT CERTIFICATE plus an additional bonus gift.

This cash discount certificate is good toward the purchase of the $179.50 deluxe Good Housekeeper Zig Zag sewing machine. This full size, heavy duty machine makes buttonholes, sews on buttons and makes decorative zig zag patterns. (It will also make a stretch stitch so important for all your knit fabrics!)

The columnist, Sylvia Porter, points out that "A woman who sews can save at least fifty cents out of every dollar she spends on clothing and get far superior workmanship, smartness, and individuality." And can you think of a better way to beat the rising cost of living?

The Good Housekeeper is jam-proof and comes in a chic carrying case of fine aircraft luggage design.

This is a brand new 1974 model, the top of the line.

Good Housekeeper Deluxe Zig Zag Model 308 complete portable.

Regular Price	$179.50
Less Discount Certificate	100.00
YOUR TOTAL COST ONLY	79.50

Good Housekeeper sewing machines are sold and serviced in all 50 states and have a 25-year guarantee bond. Each machine comes to you completely adjusted, threaded and ready to sew. It also includes extra needles and bobbins, as well as a complete instruction book. Everything you need for creating a variety of imaginative designs in clothes and household linens.

This is the same machine advertised at $179.50 in Ladies' Home Journal Needle & Craft, Woman's Day and Modern Needlecraft magazines; the same Good Housekeeper machine that is used in Home Economics classes of high schools throughout the country.

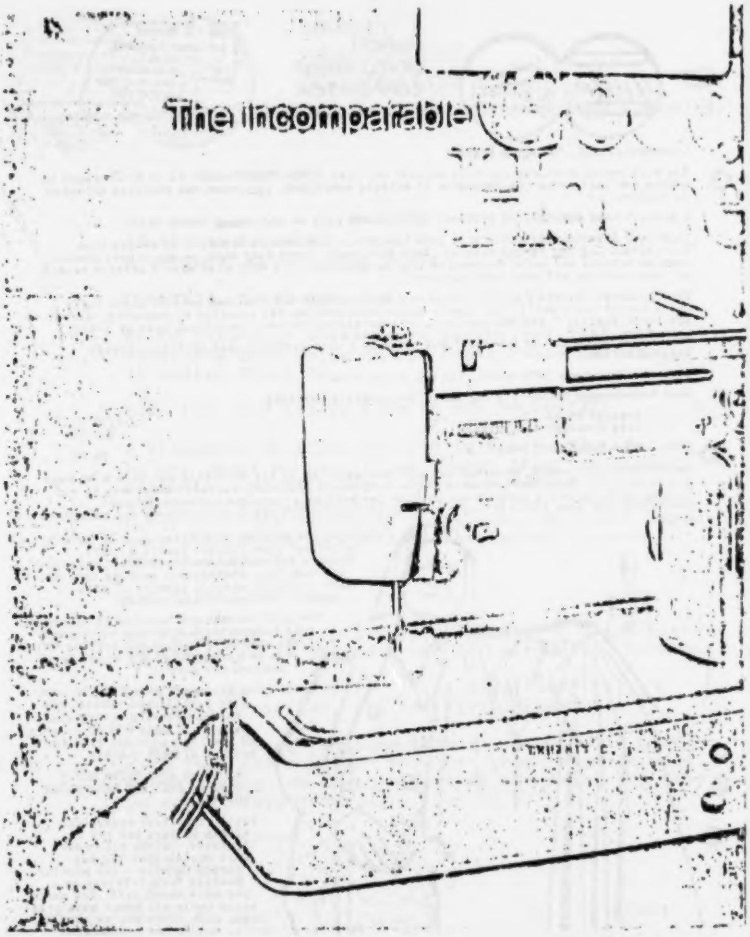
The Good Housekeeper machine is equipped with Underwriters Approved wiring and uses standard needles and bobbins which can be purchased at any store where notions are sold.

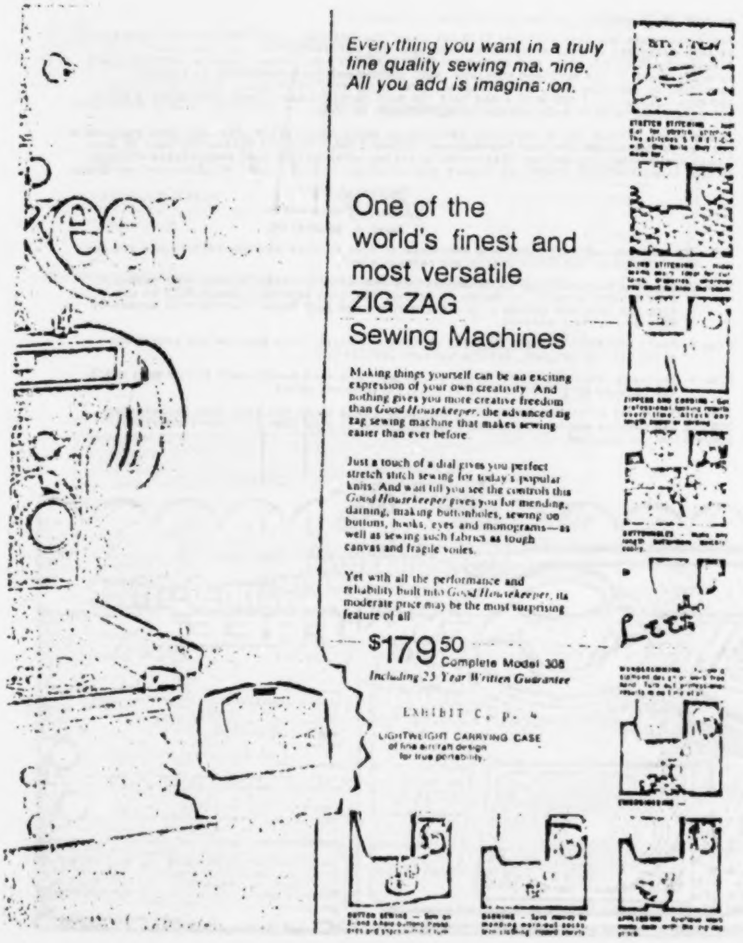
You may apply your $100.00 cash gift certificate toward this machine leaving a very small balance of only $79.50 -- one of the lowest prices ever for a machine of this quality.

PLUS ONE MORE EXTRA BONUS GIFT -- JUST FOR RESPONDING QUICKLY!

Just return your order form within 10 days and you'll receive - along with your Good Housekeeper Zig Zag sewing machine - the popular Hostess Warm-O-Trivet as a valuable bonus gift. The panel below tells all about this great bonus gift. Once you've used it you'll wonder how you managed

EXHI 1


The incomparable



Everything you want in a truly fine quality sewing machine. All you add is imagination.

One of the world's finest and most versatile ZIG ZAG Sewing Machines

Making things yourself can be an exciting expression of your own creativity. And nothing gives you more creative freedom than *Good Housekeeper*, the advanced zig zag sewing machine that makes sewing easier than ever before.

Just a touch of a dial gives you perfect stretch stitch sewing for today's popular knits. And wait till you see the controls this *Good Housekeeper* gives you for mending, darning, making buttonholes, sewing on buttons, hooks, eyes and monograms—as well as sewing such fabrics as tough canvas and fragile voiles.

Yet with all the performance and reliability built into *Good Housekeeper*, its moderate price may be the most surprising feature of all.

179^{50} Complete Model 308

Including 25 Year Written Guarantee

EXHIBIT C, p. 4

LIGHTWEIGHT CARRYING CASE
of fine aircraft design
for true portability.

STRETCH STITCHING —
BLIND STITCHING —
ZIPPERS AND CORDING —
BUTTONHOLES —
MONOGRAMMING —
EMBROIDERING —
APPLIQUEING —
BUTTON SEWING —
DARNING —

• without it, I promise - a true $5.95 value in itself.

• Since your name has been selected from our Super Sweepstakes, I am sure you will be anxious to take advantage of your sweepstakes winnings. You may use your Master Charge or BankAmericard if you wish, and spread out your payments over several months, or send check or money order in the enclosed envelope. But, understand the transaction is not yet complete. We take the risk, I must repeat, your money will be promptly refunded in full. (30 days inspection.) YOU MUST AGREE THAT YOU HAVE RECEIVED MANY TIMES YOUR MONEY'S WORTH. YOU HAVE EVERYTHING TO GAIN AND ABSOLUTELY NOTHING TO LOSE.

In any event, please let me know your decision as early as possible. You will find enclosed a postage paid envelope for your convenience. Unless I hear from you within the next 10 days I must assume that you are not interested in taking advantage of your sweepstakes winnings. At that time, I will be compelled to pass your winnings on to the next eligible contest winner.

Cordially yours,

James A. Lancaster

James A. Lancaster

P.S.: So that you may take immediate advantage of your contest winning certificate you may use any one of our three convenient payment plans.

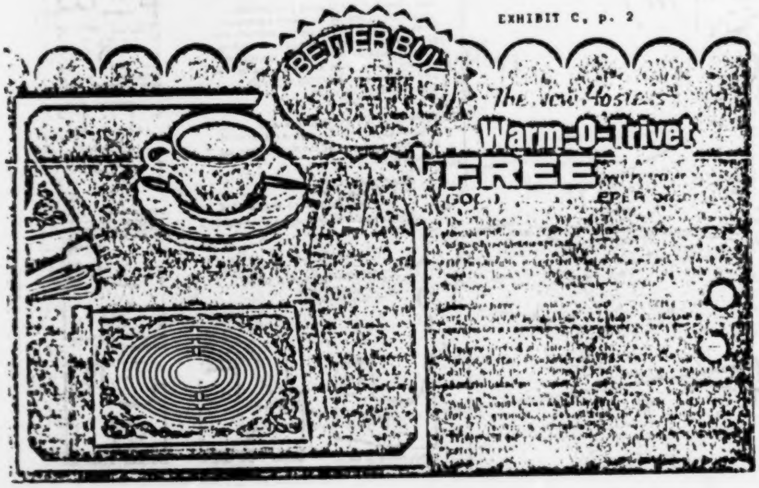
Plan 1. Use your Master Charge or BankAmericard and, if you desire, spread your payments over several months, or charge it to your American Express. Simply fill in and sign the enclosed charge slip. Your machine and your Warm-O-Trivet will arrive by Express, freight collect.

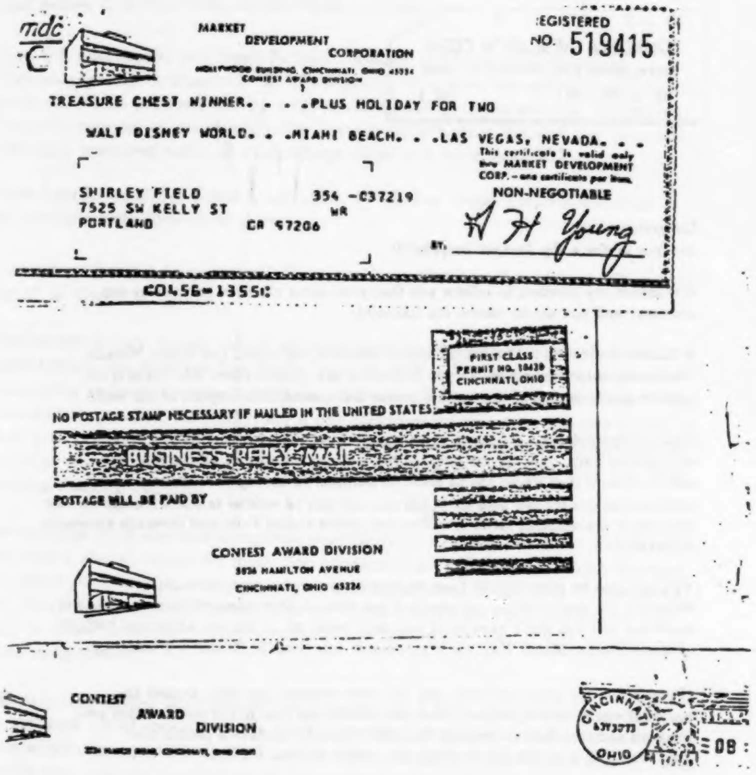
Plan 2. Remit $79.50 as payment in full, no interest added. Your machine and your bonus gifts will be shipped, freight collect IMMEDIATELY.

Plan 3. Lay-away. Remit with your order $10 or more and each month remit $10 or more until the balance of $79.50 is paid in full, no interest added.

Just fill out one of the enclosed order blanks and mail today and your Good Housekeeper 308 Zig Zag machine and bonus gift will be delivered to your home for your complete inspection. No salesman will call.

EXHIBIT C, p. 2





mdc
C

MARKET
DEVELOPMENT
CORPORATION
HOLLYWOOD BUILDING, CINCINNATI, OHIO 45224
CONTEST AWARD DIVISION

REGISTERED
NO. 519415

TREASURE CHEST WINNER. . . .PLUS HOLIDAY FOR TWO

WALT DISNEY WORLD. . .MIAMI BEACH. . .LAS VEGAS, NEVADA. . .

This certificate is valid only thru MARKET DEVELOPMENT CORP. – one certificate per item.

NON-NEGOTIABLE

BY: A H Young

SHIRLEY FIELD
7525 SW KELLY ST
PORTLAND OR 57206

354 -C37219
WR

C0456-1355

FIRST CLASS
PERMIT NO. 10420
CINCINNATI, OHIO

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

BUSINESS REPLY MAIL

POSTAGE WILL BE PAID BY

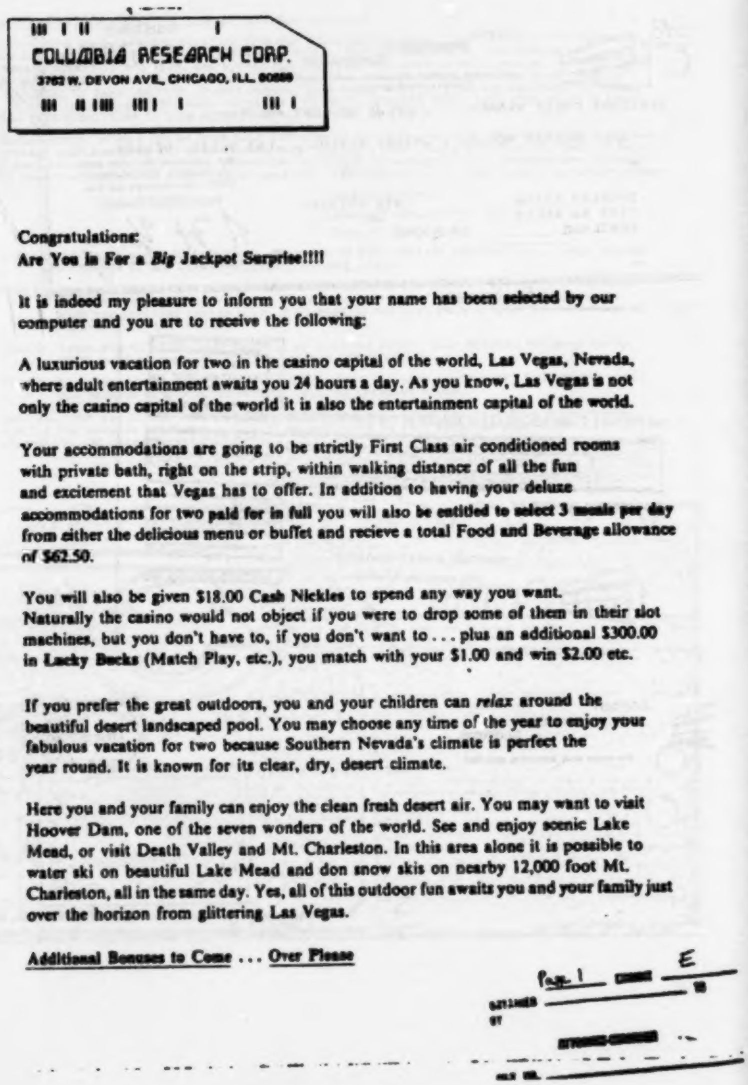
CONTEST AWARD DIVISION
3834 HAMILTON AVENUE
CINCINNATI, OHIO 45224

CONTEST
AWARD
DIVISION

CINCINNATI
OHIO

08

EXHIBIT D



COLUMBIA RESEARCH CORP.
3762 W. DEVON AVE., CHICAGO, ILL. 60659

Congratulations:
Are You in For a *Big* Jackpot Surprise!!!!

It is indeed my pleasure to inform you that your name has been selected by our computer and you are to receive the following:

A luxurious vacation for two in the casino capital of the world, Las Vegas, Nevada, where adult entertainment awaits you 24 hours a day. As you know, Las Vegas is not only the casino capital of the world it is also the entertainment capital of the world.

Your accommodations are going to be strictly First Class air conditioned rooms with private bath, right on the strip, within walking distance of all the fun and excitement that Vegas has to offer. In addition to having your deluxe accommodations for two paid for in full you will also be entitled to select 3 meals per day from either the delicious menu or buffet and recieve a total Food and Beverage allowance of $62.50.

You will also be given $18.00 Cash Nickles to spend any way you want. Naturally the casino would not object if you were to drop some of them in their slot machines, but you don't have to, if you don't want to . . . plus an additional $300.00 in Lucky Bucks (Match Play, etc.), you match with your $1.00 and win $2.00 etc.

If you prefer the great outdoors, you and your children can *relax* around the beautiful desert landscaped pool. You may choose any time of the year to enjoy your fabulous vacation for two because Southern Nevada's climate is perfect the year round. It is known for its clear, dry, desert climate.

Here you and your family can enjoy the clean fresh desert air. You may want to visit Hoover Dam, one of the seven wonders of the world. See and enjoy scenic Lake Mead, or visit Death Valley and Mt. Charleston. In this area alone it is possible to water ski on beautiful Lake Mead and don snow skis on nearby 12,000 foot Mt. Charleston, all in the same day. Yes, all of this outdoor fun awaits you and your family just over the horizon from glittering Las Vegas.

Additional Bonuses to Come . . . Over Please

Page 1 E

And Believe It or Not There Is Still More to Come!

You will also receive our Super Jackpot Package of brand name products. This package will be crammed full of nationally advertised Household and Cosmetic products. These products are from the world's leading manufacturers. Something for every member of the family. They are not sample sizes, but full size products. The total combined value of this package alone will be at least $25.

Now bear in mind the Grand Total value of this Las Vegas Jackpot amounts to approximately $500.00 or more.

You are probably asking yourself "How can they possibly afford it? or "Who pays for all of this?"

The answer is very simple. All of our participating sponsors are contributing their share toward this fabulous Las Vegas Jackpot. It is only through their combined advertising budgets, along with ourselves, Columbia Research, that makes this entire presentation possible. Naturally, all of our participating sponsors are very proud of their products and feel that through this program you will have an opportunity to acquaint yourself first hand with their many fine products, including their fun filled, exciting vacation facilities.

And perhaps after you have completed your fabulous Las Vegas Jackpot Holiday and have had a chance to use the many fine products from your Super Jackpot Package, you might drop us a line and give us your candid opinion, suggestions or comments, etc. You know every business likes to get testimonials from their customers. You may be asked to fill out a short questionnaire form which would help us with our advertising research.

This is a very limited offer you will be accepted on a first come, first serve basis. So you must act at once. It is very important that I receive your order confirmation form within the next 10 days. You don't have to make your reservations *now* . . . you do this when you are ready to go on your vacation. You have one full year to decide. There is a very small service charge of $15. (total cost to you) that we must charge to supplement the cost of acquiring, registering and confirming your Super Las Vegas Jackpot Holiday for two. This includes your lodging accommodations and all meals in Las Vegas, etc., everything mentioned earlier in this letter plus packaging, handling, freight charges and insuring safe arrival of your Super Jackpot package of nationally advertised products to your door.

Naturally, if for any reason whatsoever, upon the completion of your holiday for two, you feel that you did not have the vacation of a lifetime and you were not totally delighted with your accommodations, your $15.00 service charge will be refunded in full . . . and you still keep everything that you received in your Super Jackpot Package with our compliments.

I sincerely hope that you will be able to take advantage of this wonderful opportunity. You will definitely enjoy the vacation of a lifetime and be more than delighted with the many fine products that will arrive in your **Super Jackpot Package.**

Simply fill in the enclosed Vacation Jackpot order confirmation form. Also, you must *endorse the back* of your registered form. Please use the postage paid, self-addressed envelope that I have included for your convenience. *Unless I hear from you within the next 10 days* I must assume that you are not interested in accepting your Super Las Vegas Jackpot Package and your Las Vegas Vacation for Two.

Cordially yours,

Norman Hill

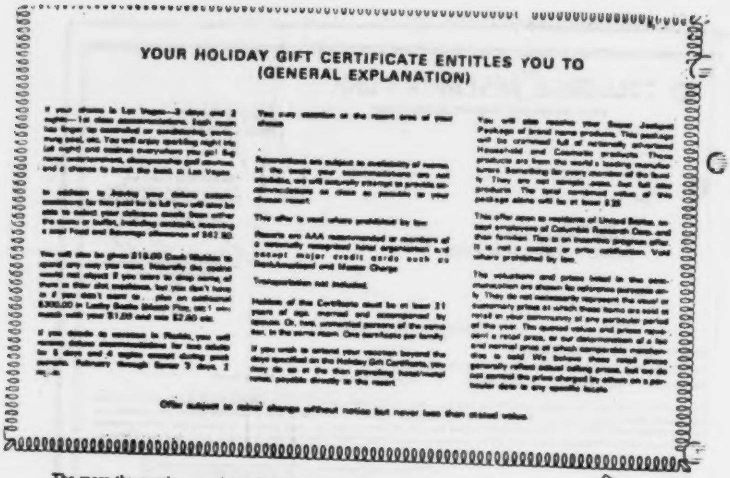
Norman Hill
Fulfillment Director

P.S. You don't have to make your reservations now . . . you do this when you are ready to go on your vacation. Then mail the reservation area request form (20 days prior to your planned departure date) and you will receive reservation and confirmation for the resort area of your choice. You have a full year to decide where and when you use your Vacation Certificate. This Certificate is given to you as an additional bonus along with the many fine products contained in your Super Jackpot Package of nationally advertised products. However, I want to add that the Vacation Certificate is naturally by far the most valuable part of this valuable offer. This Certificate can be transferred at any time. It makes a nice birthday or holiday gift. Be sure to clearly indicate your choice of vacation areas on your acceptance form. **Be sure to mail it within the next 10 days.** Remember, you are risking nothing because your order is filled on a **100% money-back guarantee.**

P.P.S. Perhaps you would rather vacation in the beautiful sunshine state of Florida. You will receive first class deluxe accommodations for two adults for five days and four nights* plus receive over $15 in valuable vacation coupons that can be applied toward attractions, admissions, restaurants and other fabulous Florida features. You may choose the resort area which you would enjoy most —

St. Petersburg/sparkling Clearwater,

Central Florida, Walt Disney World area.



YOUR HOLIDAY GIFT CERTIFICATE ENTITLES YOU TO
(GENERAL EXPLANATION)

The more the merrier . . . . Let others be your guest . . . .

"Be Our Guest!"

One of the best rewards that we can receive in life is the joy of sharing our good fortune with others. Now it is possible for you to say "Be Our Guest" to those who are very special. If you have friends or relatives who meet the requirements and who may wish to accompany you to Las Vegas on this special offer, you may order an additional Las Vegas Vacation and Super Jackpot Package. This would certainly be an excellent gift for any occasion such as birthdays, anniversaries, Christmas, etc. Just fill out the information below and mail this form to us— only one certificate per family per year may be used. Vacations may be planned together or separately.

Please ship the Super Jackpot Bonus Package of Nationally advertised products, including a Las Vegas Holiday Vacation for two Gift Certificates.

Enclosed you will find a personal check or money order for $15.00 payable to Columbia Research. I understand that the money back guarantee applies to this order as outlined in your letter.

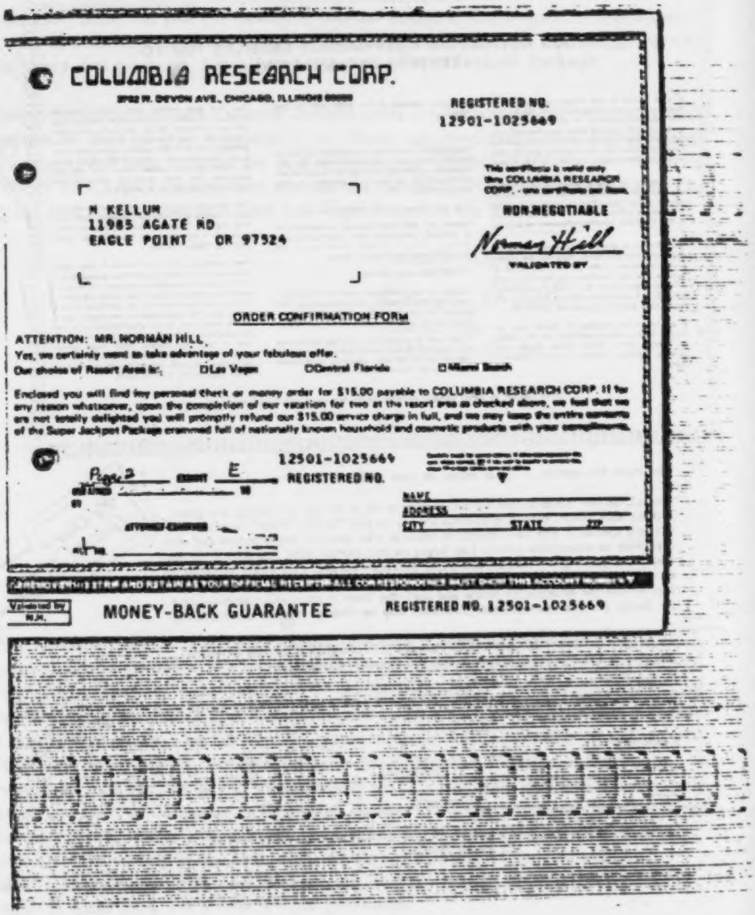
Please ship to:

NAME ____________________ ADDRESS ____________________

CITY ____________________ STATE ______________ ZIP ____________

Choice of Resort Area is ☐ Las Vegas ☐ Florida's Disneyworld area
☐ Miami Beach

100% Money Back Guarantee



COLUMBIA RESEARCH CORP.

W. DEVON AVE., CHICAGO, ILLINOIS

REGISTERED NO.
12501-1025669

This certificate is valid only thru COLUMBIA RESEARCH CORP. - one certificate per item.

NON-NEGOTIABLE

Norman Hill

VALIDATED BY

N KELLUM
11985 AGATE RD
EAGLE POINT OR 97524

ORDER CONFIRMATION FORM

ATTENTION: MR. NORMAN HILL

Yes, we certainly want to take advantage of your fabulous offer.

Our choice of Resort Area is: ☐ Las Vegas ☐ Central Florida ☐ Miami Beach

Enclosed you will find my personal check or money order for $15.00 payable to COLUMBIA RESEARCH CORP. If for any reason whatsoever, upon the completion of our vacation for two at the resort area as checked above, we feel that we are not totally delighted you will promptly refund our $15.00 service charge in full, and we may keep the entire contents of the Super Jackpot Package crammed full of nationally known household and cosmetic products with your compliments.

12501-1025669
REGISTERED NO.

Page 2 EXHIBIT E

NAME
ADDRESS
CITY STATE ZIP

REMOVE THIS STUB AND RETAIN AS YOUR OFFICIAL RECEIPT. ALL CORRESPONDENCE MUST SHOW THIS ACCOUNT NUMBER ▼

Validated by N.H.

MONEY-BACK GUARANTEE

REGISTERED NO. 12501-1025669

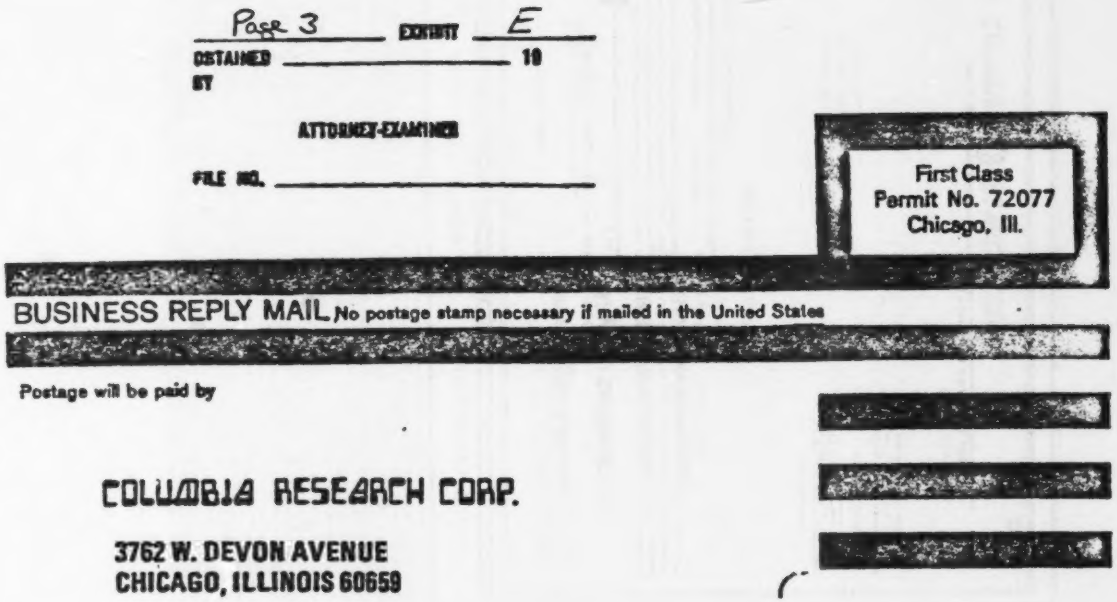
PLEASE ENDORSE ON THIS LINE

Endorse above and return this

ENTIRE document after

REMOVING THIS STUB

This stub is your official receipt.



Page 3 EXHIBIT E

OBTAINED BY ______ 19

ATTORNEY-EXAMINER

FILE NO. ______

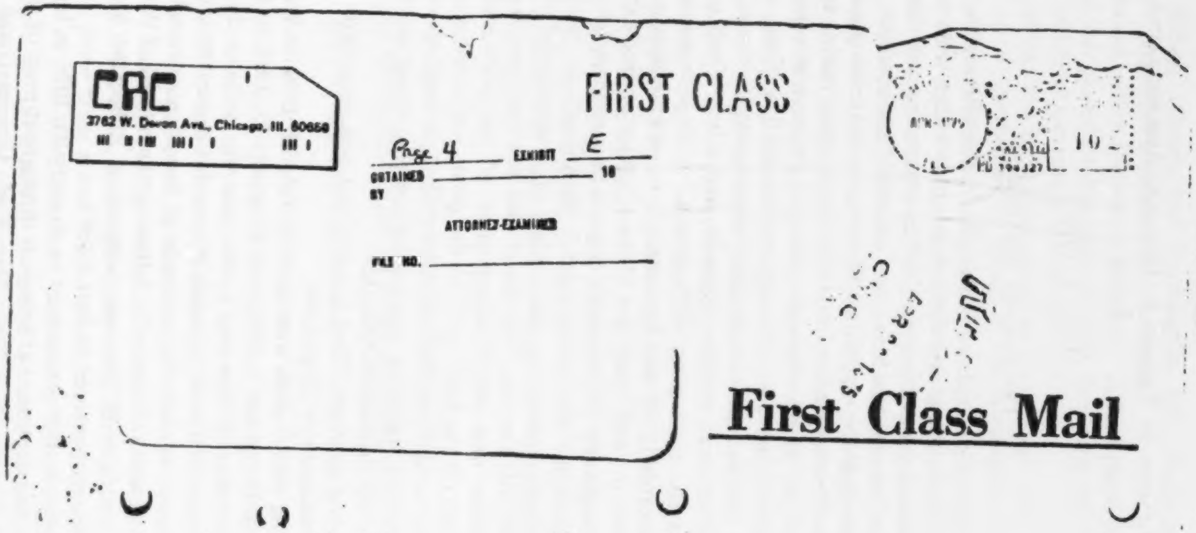
First Class
Permit No. 72077
Chicago, Ill.

BUSINESS REPLY MAIL No postage stamp necessary if mailed in the United States

Postage will be paid by

COLUMBIA RESEARCH CORP.

3762 W. DEVON AVENUE
CHICAGO, ILLINOIS 60659



CRC
3762 W. Devon Ave., Chicago, Ill. 60659

FIRST CLASS

Page 4 EXHIBIT E
OBTAINED BY ______ 19
ATTORNEY-EXAMINER
FILE NO. ______

First Class Mail

Initial Decision by Thomas F. Howder, Administrative Law Judge

June 7, 1979

Preliminary Statement

The Commission's complaint in this case, issued December 19, 1975, charges two corporations and three individuals with a wide variety of deceptive statements and practices in the advertising and distribution of "vacations," sewing machines, and household and cosmetic products through mass mailings, magazines, newspapers and catalogues. [2]

Thirty specific charges are listed in the complaint, having to do with such matters as: (1) the characterization of respondent companies as market research firms, as offering promotional incentives, as having co-sponsors and as representing other companies; (2) the offering of "free" vacations and vacation coupons, and other "free" goods and services; (3) the conducting of "contests," with concomitant prizes, winnings, awards, gifts and bonuses; (4) representations concerning "special selection" and "once-in-a-lifetime" opportunities, with limited times for acceptance; (5) monetary charges to customers for what was described variously as "registration," "handling" or "service"; (6) representations concerning the value of respondents' "Treasure Chests" and "Gift Cartons," the size of products contained therein, and the description and retail selling price of the perfumes in such packages; and (7) the total value of the goods and services offered by respondents. In addition, the complaint challenges respondents' sales of sewing machines, including representations concerning servicing, use, retail prices and discount certificates.

Respondents' answers, filed in early and mid-June 1976, generally denied the substantive allegations.

Prehearing conferences were held on July 19, 1976, in Washington, D.C., and on December 1, 1976, and February 15, 1977, in Cleveland, Ohio. The process of discovery in this case was arduous. Respondents Raymond Anderson and Columbia Research Corporation[1], in particular, vigorously resisted the attempts of complaint counsel to obtain needed information. Eventually, following the refusal of these respondents to comply with discovery subpoenas, it became necessary to impose sanctions pursuant to Rule 3.38(b).

Trial of this matter commenced on January 31, 1978, in Los Angeles, California, and continued at intervals throughout most of that year in Las Vegas, Nevada; New York, New York; Cincinnati and Cleveland,

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[1] Frequently referred to herein as "CRC."

Ohio; Chicago, Illinois; and Washington, D.C. Much of the record consists of consumer testimony and evidence.

The record (which includes a transcript of 6101 pages and over 1100 exhibits) was closed on February 5, 1979, following the disposition of various post-trial motions of the parties.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied. [3]

This proceeding is before me upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondents Raymond Anderson and CRC. The proposed findings of fact, conclusions and arguments of these parties have been carefully considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

The transcript of testimony is usually referred to with the last name of the witness and the page number or numbers upon which the testimony appears. For a complete listing of the abbreviations used in this Initial Decision, see Appendix A, pp. i–iii.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings and conclusions submitted by the parties, I make the following findings:

FINDINGS OF FACT

I. IDENTITY OF RESPONDENTS AND THE NATURE OF THEIR BUSINESS

A. Market Development Corporation

1. Market Development Corporation ("MDC") was a corporation organized, existing and doing business under, and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 5826 Hamilton Ave., Cincinnati, Ohio. MDC began operating in late 1969 and terminated its business operations in June 1974, when it filed for bankruptcy (Complaint, ¶ 1 and Answer of Raymond Anderson, ¶ 1; CX 660A, B; Joseph Anderson 3928–29).

2. MDC grew from about four clerical employees in 1970, when it was located at 5918 Hamilton Ave., Cincinnati, Ohio, to approximately 15 employees in 1971, when it moved to 5826 Hamilton Ave. It employed 15 to 20 sales personnel in 1970 to conduct in-home sales presentations of sewing machines (Harris 5023–26, 5028). At the time

that it terminated business in June 1974, MDC employed 22 individuals, including respondent Raymond Anderson (CX 673A–B).

3. MDC also established a plant located at 3584 Hauck Road in Cincinnati, Ohio (Harris 5024). This plant operated from a warehouse type building with postage meters, printing equipment, sorting machines and other equipment (Harris 5027), and employed a total of about 25 individuals (Joseph Anderson 3993). MDC maintained an inventory of sewing machines, Treasure Chests and trivets at its Hauck Road facilities (Joseph Anderson 3970, 3975). [4]

4. When MDC first began operations, it sold sewing machines primarily in Ohio and West Virginia through in-home presentations conducted by its sales force. The sales force was disbanded when the firm began offering sewing machines through mail order solicitations (Joseph Anderson 3928, 3930–32).

5. MDC's sewing machine customers were offered three payment options: cash, layaway or credit card (Flach 3506–07; CX 1329).

6. In addition to sewing machines, MDC offered the following products and services to consumers: vacation certificates; promotional kits, including ones denominated as "Treasure Chests," which contained household and cosmetic products; and trivets (Karniol 2008–10; Taubes 2243–46; CX 288A; Juanita Anderson 3716–17; Joseph Anderson 3931–32, 3937, 3969–70; Flach 3567–68). These products and services were presented to consumers primarily through solicitations in direct mailings and magazines (Joseph Anderson 3930–32; Flach 3500–02; *see, e.g.*, Fs. 8, 12, 60).

7. Florence Wolf, Inc., a company that supplied mailing list services to its customers (Sutton 4148–49), dealt with respondents Raymond and Juanita Anderson and provided mailing lists to MDC containing the names of consumers to whom solicitations would be sent (Sutton 4154–55, 4164–66).

8. MDC utilized mass mailings in making its direct mail solicitations to consumers (*see, e.g.*, CX's 1700A–B, 1701, 1705, 1710, 1715, 1720). The solicitations were sent out on a daily basis (Joseph Anderson 3973), and, at one point, amounted to as many as 529,000 pieces mailed in one month (CX 1705). Millions of consumers throughout the United States received solicitations from MDC[2] (Fs. 60, 77, 93).

9. MDC conducted test mailings of its solicitations in order to determine which elicited the highest percentage of incoming orders from consumers (Joseph Anderson 3959–61). In order to break even, MDC needed paid responses to its mailings of between 1.5% and 1.7%

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[2] In some instances, MDC instructed its computer processing firm to delete the names of consumers living in certain states such as Ohio and Michigan (Sarbaugh 3648–49; CX 2061).

(Karniol 2070–71). Its actual rate of responses ranged from 3.5% to 5% (Karniol 2070). [5]

10. Initially, MDC processed about 20 incoming sewing machine orders per day manually; by 1973, the number of orders had increased to 40 to 50 per day (Flach 3513–14, 3523, 3529).

11. Subsequently, MDC began processing orders by computer. The firm would give its customer orders to a computer house which processed the orders and returned a print-out sheet and shipping labels to MDC. MDC employees then calculated the shipping charges, entered those charges on the labels and made up the shipping orders. The sewing machine shipping orders were stored at MDC's Hamilton Avenue location until instructions were given to send the orders to the Hauck Road facilities (Flach 3516–19).

12. MDC conducted various contests and placed entry forms in magazines such as TV Guide, Family Circle and Good Housekeeping. By returning an entry form filled in with their name, address and phone number, consumers would become eligible to win prizes such as sewing machines or electric scissors. Entries would be keypunched and a computer would select the winning names based on a mathematical formula correlated to the number of prizes that MDC represented would be given away. For example, if a contest had 1,000 entrants and there were 20 prizes to give away, the computer would select every fiftieth name (Harris 5032–42).

13. In addition to offering sewing machines by mail, MDC offered vacations in the form of vacation certificates to consumers responding to its solicitations. MDC purchased vacation certificates from several companies that also arranged for the accommodations of MDC's customers in hotels or motels. These certificate companies included Genie Enterprises ("Genie") in Las Vegas, Nevada; Vacation Incentives and Properties, Inc. ("V.I.P.") in Miami, Florida; and Resort Hosts International, Inc. ("Resort Hosts") in St. Petersburg and on the west coast of Florida (Juanita Anderson 3743–47; Wray 5276–77; CX's 867, 875, 883, 884). As an example, MDC paid $1.00 for each certificate provided by V.I.P., and placed orders in quantities as high as 25,000–30,000 certificates for a one-month period (CX's 867, 875, 883, 884; Wray 5277).

The certificates that MDC purchased were for accommodations at the Sheraton Hotel in St. Petersburg, the Sheraton West in Orlando, the Colonial in St. Petersburg Beach, and various hotels in Fort Lauderdale, Florida and elsewhere. Resort Hosts, one of the companies from which MDC purchased the certificates, honored the certificates even though MDC had subsequently gone bankrupt. Resort Hosts did so, according to witness Wray, because it "was a land development company [and] looked at the people who came in . . . as good prospects and they wanted them to come." (Wray 5276-78). [6]

14. MDC purchased household and cosmetic product kits primarily from Value Package, subsequently known as A.M. Sampling (F. 322), and Selective Sampling in New York, New York, and offered them to consumers in a box shaped like a treasure chest (Karniol 2017-20; Taubes 2242-43; Harris 5047). The products in the Treasure Chest were almost all nationally advertised products and included over-the-counter drugs, toiletries, cosmetics, shampoo, foodstuffs, perfume, and health and beauty aids (Karniol 2098-99; Taubes 2232, 2235, 2246; *see, e.g.*, CX's 749, 979, 981, 997).

15. The perfume contained in the kits was supplied by Grafton Products and was sent, at MDC's direction, to Selective Sampling and Value Package for placement in the Treasure Chests (Karniol 2024; Taubes 2246-47). Grafton supplied the entire perfume package for MDC which consisted of a bottle, cap, five labels, fragrance, colored water, a piece of tape, a chipboard box and paper wrapping. The perfume was named "Beau Bien" (Marcus 3230-31).

16. MDC ordered generally 5,000 to 10,000 bottles of perfume per month from Grafton Products (Marcus 3227-29); an order in January 1974 was for 12,096 pieces (CX 1915). Selective Sampling filled 25,000 to 30,000 orders per month for MDC when business was at its peak, and 3,000 to 6,000 orders per month during slow periods (Karniol 2068-69). MDC's orders from Value Package ranged from 7,500 to 11,500 kits per shipment (CX's 978-80, 987-90).

17. The kits supplied by Selective Sampling cost MDC $2.00 F.O.B. Hicksville, New York (Karniol 2069; CX's 1000, 1003, 1006); those supplied by Value Package cost MDC from $1.60 to $1.76 each (CX's 987-90).

18. MDC often provided the kit suppliers with shipping instructions and shipping labels and, in turn, the suppliers sent the kits directly to MDC's customers (Karniol 2021-22). In other instances, MDC received the kits in Cincinnati, Ohio for subsequent shipments to its customers (Taubes 2244).

B. Columbia Research Corporation

19. Columbia Research Corporation ("CRC") is a corporation organized, existing and doing business under, and by virtue of, the laws of the State of Illinois, with its offices and principal place of business located at 3762 West Devon Ave., Chicago, Illinois (Complaint, ¶ 1 and Answer of CRC, ¶ 1). CRC began doing business in November 1974 (CX 1236A). [7]

20. When CRC commenced operating in November 1974, it em-

ployed approximately three individuals. By 1976, it had grown to a staff of 15 employees. (Balko 4911, 4914; Jacobson 4973).

21. CRC offer the following products and services to consumers: vacation certificates; packages of household and cosmetic products called "Gift Cartons"; blackjack boots; and memberships in a buying club (Boyd 1821–23, 1829–30; Jenni 1905; McGuire 2377–78; Taubes 2264, 2266–68; Stipulation, pp. 3–4; CX's 335A–D, 463A–D, 464, 467A, 1236C, 1655, 1656A–B, 1657A–B). These products and services were presented to consumers through solicitations in direct mailings, magazines, newspapers and catalogues (CX 1236C; Stipulation, p. 2).

22. First National List Services, Inc., a mailing list brokerage company similar to Florence Wolf, Inc. (Sutton 4152–54. See F. 7), was approached by Raymond Anderson and CRC in late 1974, and provided mailing list services to CRC between 1974 and 1976[3] (Sutton 4166–68, 4175–76).

Individuals were selected to receive CRC's offers from these mailing lists. Selection was based on particular demographic and psychographic characteristics determined by CRC, including residence, marital status, age, income and spending habits (Sutton 4172–74, 4227). In most cases, First National List Services utilized data cards to supply the information relative to these criteria (Sutton 4227–28).

23. The lists which had been selected were sent to Universal Data Systems, Inc. ("Universal"), the company that provided computer processing services to CRC, where they were matched up against certain tapes possessed by Universal. The tapes included census tract information which covered a broad range of criteria such as family, type of residence, traveling history, race, employment, etc. Universal then selected or discarded particular groups of names on the list depending on whether they did or did not meet the particular criteria specified (Sutton 4228–29; RX 62–206).

24. Universal addressed original mailing pieces (either mailing coupons or computer letters), processed incoming orders, printed shipping documents, printed reservation request forms [8]and printed reservation confirmations for CRC (RX 62–231–32,–236, –251–52). Universal provided Raymond Anderson and CRC with a weekly response analysis showing the mailing list, when the solicitations were mailed and the percentage of responses, analyses of customer files by expiration date and location choice, and a weekly printout on the mailing lists used by CRC (RX 62–217–18,–228, –234). Universal also maintained a customer file for CRC (RX 62–220–21).

25. CRC conducted tests of its mailing lists. Such tests involved

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[3] CRC ordered a total of 2,753,600 names from various list owners through First National between September 30, 1976 and July 26, 1976 (CX 1589A–H).

renting a small quantity of names (usually about 5,000), mailing particular solicitations to those names and checking the response rate. (Sutton 4158, 4176–77). According to witness Sutton, the standard rate of response in the mail order industry is 3% to 5% (Sutton 4186).

26. As noted, CRC offered vacations in the form of vacation certificates to consumers responding to its solicitations (Jacobson 4985; Stipulation, p. 2; F. 21).

CRC purchased vacation certificates from a variety of sources, including Bay Shore Yacht & Tennis Club in Indian Shores, Florida; Genie Vacations in Las Vegas; and Miami-Las Vegas Vacation Bureau in Las Vegas (Joseph Anderson 4022, 4042; McGuire 2350; CX's 1089A–C, 1937–41, 1943). CRC also purchased gaming certificate packages from several casinos in Las Vegas (Joseph Anderson 4072–73; CX's 1652, 1656A–B, 1913, 1914). CRC also furnished show tickets to some of its Las Vegas customers. Some of these show tickets were purchased by CRC and some were obtained by CRC at no charge (Joseph Anderson 4071–72).

27. CRC provided accommodations for its customers in Las Vegas by entering into agreements with various Las Vegas motels to purchase a block of rooms at an average price to CRC of about $10 per day or $20 for two nights (Joseph Anderson 4032, 4038–39, 4062; CX's 703A–B, 706A–B).

28. Consumers responding to CRC's direct mail solicitations forwarded to CRC a check or money order usually in the amount of fifteen dollars ($15.00). According to the offer, or consumers' belief based upon their reading thereof, this amount covered all of the items which were offered, computer registration of their names, the printing of the offer and other written materials, processing of hotel reservations and other services applicable to the offer. Consumers understood that they could avail themselves of the offer if they responded within ten days, and that they might not be able to obtain the items offered if they failed to respond within that time (Stipulation, p. 2; Joseph Anderson 4062). [9]

Consumers were required to fill out an acceptance form attached to CRC's solicitation (*see, e.g.*, CX 272A–D) or a form that came in the same envelope (*see, e.g.*, CX's 491, 522) in order to take advantage of the vacation offer. There was also the option of filling out an acceptance form for a guest (*see, e.g.*, CX 2720). The acceptance form instructed the customer to select a vacation choice and then send the form and a check or money order covering the number of vacation packages ordered to CRC in Chicago (*see, e.g.*, CX's 272D, 273).

29. Within 30 days after CRC cashed their check or money order, these consumers received a vacation certificate from CRC listing the

geographic location which they specified in their initial order. The vacation certificates were substantially similar to one or more of CX's 58, 59, 204B, 252, 284B, 318, 319 (top), 338, 421, 433, 452, 483, 515, 535, 598 (bottom), 1660, 1660A, 1847A–C, 1867, 1876A–B, 2048 (Stipulation, p. 2).

After receiving the vacation certificates, the consumers' next step was to request reservations at the locations listed in the certificates such as Las Vegas, Nevada; Orlando, Florida; St. Petersburg, Florida; Miami, Florida; and Tampa, Florida, using forms substantially similar to one or more of CX's 58, 59, 204B, 252, 1847C, 318, 319 (top), 338, 421, 433, 452, 483, 284B, 515, 535, 598 (bottom), 1660, 1660A, 1847A–C, 1867, 1876A–B, 2043A–B and 2048 (Stipulation, p. 4).

30. In accordance with the instructions contained in the vacation certificates or other communications from CRC, consumers sent their requests for reservations in Las Vegas to CRC, Genie Vacations or Miami-Las Vegas Vacation Bureau. Sometimes, CRC or Genie sent customers' requests to the other. Thereafter, the customers received confirmed reservations for Las Vegas for the original or alternate dates that they requested. The hotels that they received reservations for in Las Vegas were the Westwind Motel, Baghdad Motel, Holiday Motel, Todd Motor Motel, Colonial House Motel, Mini-Price Motor Inn, King 8 Motel and Lucerne Motel. None of the customers received reservations for the California Hotel and Casino (Stipulation, p. 4; Joseph Anderson 4042–44).

31. At one time, Genie's main office was at 2128 Paradise Road, Las Vegas, Nevada. The company also had offices at the Westwind Motel and the Baghdad Motel in 1975 (Joseph Anderson 4020–21). The Paradise Road office had a small sign on the door stating, "Columbia Research Corporation" (CX 2111, p. 65). CRC had a separate telephone line in Las Vegas (Joseph Anderson 4025–26). CRC also had a checking account at the Nevada State Bank in Las Vegas. Raymond Anderson, Joseph Anderson [10]and Mike Alpert of Genie were signatories on this checking account which was to serve as a general working account for CRC in Las Vegas. The account also paid Joseph Anderson's rent and the general office rent (Joseph Anderson 4099–4100; CX 2111, pp. 136–37). According to witness Jenni, operator of the King 8 Motel, CRC used the name "Genie" in Las Vegas, and the names "CRC" and "Genie" were used interchangeably (Jenni 1911).

32. Genie had four or five employees, some of whom worked at check-in locations (Joseph Anderson 4022, 4056–57). As reservations were confirmed, CRC and/or Genie would enter the customer's name, address and other pertinent information on a manifest. There was a separate manifest for each date; the manifest was filed in chronologi-

cal order by arrival date. A copy of the manifest was sent to CRC in Chicago. The day before the arrival date, the manifest was pulled out and sent to the motel involved (Joseph Anderson 4029–31, 4041; CX 2111, pp. 66, 70–71). There was a cut-off point of about 50 to 60 people who could be handled in Las Vegas by CRC on a daily basis. When the number of reservation requests exceeded this, customers were asked to pick alternate dates (Joseph Anderson 4055–56; CX 2111, p. 82).

33. During the time that CRC dealt with Phil Gold of Miami-Las Vegas Vacation Bureau, consumers sent their reservation forms to CRC. CRC recorded the customers' names and addresses on a list and forwarded the request forms to Phil Gold (Joseph Anderson 4048–49), who arranged accommodations for CRC customers during this time period instead of Genie, and performed the same functions as Genie (Joseph Anderson 4042–44).

34. Consumers requesting Florida vacations sent their requests for reservations to the following Florida companies: AITC Travel, Inc.; Bay Shore Yacht and Tennis Club; Lehigh Corporation; or National Travel, Inc. Thereafter, these customers received confirmed reservations for Florida for the original dates or alternate dates that they requested, so long as they did not ask for holiday or weekend arrivals. The reservations were filled at the following hotels: Winter Gardens Hotel, Winter, Florida; Lehigh Motel, Ft. Myers, Florida; Days Inn, Orlando, Florida; Season Hotel, Ft. Lauderdale, Florida; and hotels and apartments owned by Bay Shore (Stipulation, p. 5; McGuire 2373–76, 2422–23).

35. In a number of instances, consumers requesting Las Vegas were informed on the vacation certificates of Genie to send to CRC or Genie, along with their reservation requests, [11]a deposit of twenty-five dollars ($25.00) to confirm and to hold their reservations. In a number of other instances, Florida customers were requested on the vacation certificates of AITC Travel, Inc., Lehigh Corporation and National Travel, Inc. to send in a deposit of ten dollars ($10.00) to the above-named companies to guarantee their reservations. Those persons traveling to Las Vegas received their deposits back, on their arrival, in cash or in gaming script, at their option. Those persons who traveled to Florida usually received their deposits back in cash upon their arrival (Stipulation, p. 5; *see, e.g.*, Lawley 454–56; Blackmore 691–93).

36. Those customers who went to Las Vegas appeared at the check-in location indicated on their confirmation form for the purpose of receiving their lodging accommodations. In many instances, they also received from Genie gaming-meal-and-beverage packages of various casinos, each of which, if used independently, could be redeemed in a specified manner at the casino involved over the course of the three-

day/two-night stay in Las Vegas. The gaming-meal-and-beverage packages were usable at the following casinos: King 8 Hotel and Casino, California Club, Jackpot Casino, Lady Luck Casino, Silver City Casino, Foxie's Firehouse Casino and Castaways. The packages were substantially similar to one or more of CX's 242A–E, 244A–P, 245A–B, 247, 711A–B, 1480, 1769; CPX1–C, CPX1–H, CPX1–Q, CPX1–R, CPX1–S; RX 22 and RX 23. The customers also received photo souvenirs with their gaming-meal-and-beverage package (Stipulation, p. 6 *see, e.g.*, Lawley 463–68; Blackmore 693–97). At the time of their check-in, they were supposed to receive a refund of their room deposit (*see, e.g.*, Lawley 466–67; Blackmore 694; Fs. 35, 125).

37. "Time-sharing" is a method of marketing condominium apartments[4] by which the use of the condominium is sold to various purchasers in time intervals of one week. The purchaser buys the condominium for a specific interval during each year (*e.g.*, the first week each January), and holds the condominium for that time interval for the life of the property (usually 30 years). The purchase is evidenced by a sales contract (*e.g.*, [12]CX 1928), with the sale price generally paid over a period of four years (McGuire 2354–57). The purchaser of a time-sharing arrangement receives the same shelter space and benefits or amenities as a condominium buyer, but pays a daily usage fee instead of a monthly maintenance fee (McGuire 2355–56).

38. While in Las Vegas, some CRC customers were solicited by a company called Caribbean International in connection with time-sharing arrangements. CRC received $27 to $30 for each couple from CRC's Las Vegas vacation program who attended a time-sharing presentation. CRC received this payment regardless of whether the customer purchased a time-sharing arrangement (Joseph Anderson 4066–68).

39. In addition to the vacations, CRC also offered some consumers a Gift Carton whose value was represented as being between $30.00 and $40.00, and which was represented to contain such articles as deodorants, shaving creams, razors, aspirins, feminine hygiene products, decongestants, antacid products, shampoos, hand lotions, facial creams, cosmetics, drink mixes, pens, colognes and perfumes or some combination thereof (Taubes 2267–68; Stipulation, p. 3; *see, e.g.*, CX's 53A–D, 349A–C, 2031A–D). These kits were supplied by A. M. Sampling, a New York firm, which sent them directly to CRC's customers. Under the arrangement, CRC paid in advance for the kits.

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[4] A "condominium," as referred to in this Initial Decision, is an apartment deeded in fee simple to the purchaser. The purchaser would also have a pro-rated share of all the commonaries or amenities and all the land that goes with the building, and would pay a monthly maintenance fee (McGuire 2350–52).

The address shipping labels were then forwarded to A. M. Sampling at its Connecticut facilities from a computer house in Chicago. A. M. Sampling then affixed the labels to the kits and sent them to the Post Office for mailing (Taubes 2264, 2267).

40. The perfume contained in the Gift Cartons was initially supplied by Grafton Products and was a house brand called "Beau Bien." Subsequently, CRC requested that A. M. Sampling purchase perfume from various manufacturers and close-out sources and include that perfume in the kits (Taubes 2268). A. M. Sampling later purchased a Faberge perfume ("Xanadu"), a Polly Bergen perfume ("Tortue") and another private label perfume ("Paris Now") for the CRC kits (Taubes 2268, 2272, 2275-76).

41. In CRC's operations, the voluminous responses of consumers were usually received at CRC's Chicago office where they were separated from other types of incoming mail. Correspondence was segregated by type and distributed to specific individuals at CRC. For example, mail addressed to "Mary Nelson" went to the CRC employee who handled reservations. The checks and other forms of payments were pulled from the orders. CRC employees entered the amount paid and placed the orders in a pile. The orders were batched, counted by state, entered into a book and placed in a big tray to be taken to the computer house (Jacobson 4946-51). Some of the incoming mail containing customer checks was sent by CRC unopened to its bank (Third CRC Admissions, Request 16). [13]

42. CRC received an average of 350 to 500 pieces of correspondence per day. It was CRC's policy not to retain consumer correspondence in its files (Jacobson 4973). Correspondence from such entities as Better Business Bureaus, Attorneys General Offices and state or local consumer offices was separated from the general consumer correspondence and, unlike the consumer correspondence, was retained by CRC (Jacobson 4985-87).

43. CRC also made use of a variety of form letters in responding to consumer inquiries and complaints. One such letter consisted of a checklist of form responses to 21 different questions that might arise (CX 215A-B). Other CRC form responses included: refunds (*e.g.*, CX's 217, 231B, 466A); erroneous reservation confirmations (e.g., CX's 177A-C, 179, 197, 1661A); reservation confirmations (*e.g.*, CX's 126, 195, 322, 339, 1946, 2044). The form letters were sent to the consumer along with the consumer's original letter to CRC.

44. Consumers attempting to telephone CRC received a recorded message, generally asking them to write since CRC could not handle the incoming calls (*e.g.*, Peters 49-51; Gorman 194-95; Lawley 445; Tuber 832-33; Third CRC Admissions, Requests 29-30).

C. Raymond Anderson

45. Respondent Raymond Anderson was president and a director of MDC. He is presently president and a director of CRC. He has participated in the operation of MDC and CRC in each of the above capacities (Complaint, ¶ 1 and Answer of Raymond Anderson, ¶ 1).

46. Raymond Anderson is the father of respondent Joseph Anderson and the ex-husband of respondent Juanita Anderson (Juanita Anderson 3707).

47. Prior to the creation of MDC, Raymond Anderson had been involved with several other firms which sold sewing machines through in-home presentations, including the following companies: (a) Universal Sewing Service; (b) Domestic Sales and Service; (c) Budget Sales (Juanita Anderson 3709–10; Joseph Anderson 3918–22).

48. Raymond Anderson filed a voluntary petition in bankruptcy on June 28, 1974 (CX 671A–N).

For a detailed description of Raymond Anderson's activities in connection with MDC and CRC, *see* Fs. 295–330. [14]

D. Joseph Anderson

49. Respondent Joseph Anderson was an employee of MDC from the company's inception in 1969 until its termination in June 1974 (Joseph Anderson 3921, 3928–29; CX 673B; Answer of Joseph Anderson, ¶ 1).

50. Joseph Anderson served as a sewing machine salesman for about one or two years and sales manager for MDC's door-to-door sewing machine sales force in 1972, a position he held for about ten months to a year; as sales manager, he was based at MDC's Hamilton Avenue location (Joseph Anderson 3928–30, 3938, 3949). Subsequently, in 1972 or 1973, he was instructed by Raymond Anderson to go to MDC's Hauck Road plant where he served as a general manager and supervised the printing, mailing and shipping operations of MDC, including the supervision of other MDC personnel such as department managers (Joseph Anderson 3949–51, 3969; CX 2111, p. 15; Juanita Anderson 3731). Joseph Anderson also, in his own words, "kept kind of an eye on things to see" concerning MDC's sewing machine repair department (Joseph Anderson 3971–72).

51. Although Joseph Anderson operated under Raymond Anderson's supervision and reported to him on a daily basis, the former also exercised independent decision making responsibility (Joseph Anderson 3952–55).

52. Joseph Anderson was employed by CRC from May 1975 to July 1976 and worked in Las Vegas where he supervised the operation of

CRC's vacation certificate program; he received a salary paid by CRC (Joseph Anderson 4017–19, 4021–22; Fs. 339, 343).

53. Joseph Anderson graduated from high school in 1964. (Joseph Anderson 3915). Soon after, and prior to his involvement with MDC and CRC, he worked for various companies in which Raymond Anderson had financial or operating interests, including the following two firms which sold sewing machines through in-home presentations: (a) Domestic Sales and Service; (b) Budget Sales; he was employed as an in-home sewing machine salesman (Joseph Anderson 3918–21; F. 47).

For a detailed description of Joseph Anderson's activities in connection with MDC and CRC, *see* Fs. 331–48. [15]

E. Juanita Anderson

54. Respondent Juanita Anderson was employed by MDC from the company's inception in 1969 until its termination in June 1974; she received a salary paid by MDC. She functioned in a supervisory capacity (Juanita Anderson 3716, 3719, 3776; Answer of Juanita Anderson, p. 2).

55. Juanita Anderson was never employed by CRC, although she did interview individuals in Chicago for employment by CRC; she selected one such individual who was subsequently hired (Fs. 316, 318, 353).

56. Juanita Anderson began working for Raymond Anderson in the early 1950's. Prior to the creation of MDC, she had been employed by Raymond Anderson when he was conducting business as Universal Sewing Service (Juanita Anderson 3708–10).

For a detailed description of Juanita Anderson's activities in connection with MDC and CRC, see Fs. 349–54.

F. Commerce

57. MDC transacted business with suppliers located outside of Ohio, many of whom shipped goods to MDC in Ohio (Elliott 1237–38, 1242, 1263–66; Taubes 2231–33, 2242–44; *see, e.g.*, CX's 897, 925, 926, 987, 988, 1648, 1649, 1915, 1916, 1924). MDC directed some of its suppliers to ship goods on its behalf to other companies or to consumers situated outside of the states in which the suppliers were located (Karniol 2243; Marcus 3233–35; CX's 1915, 1922). MDC sold and shipped its products to consumers located throughout the United States (CX's 1587, 1588, 1589A–B, 1590, 1591). Thus, MDC has been engaged in a course of trade in or affecting commerce.

58. CRC transacted business with suppliers located outside of

Illinois, some of whom sent products to CRC in Illinois (Taubes 2231–33, 2263–64; Joseph Anderson 4019–22, 4032–33, 4042–43; Third CRC Admissions, Request 37; *see, e.g.*, CX's 702, 703A–B, 705A–B, 706A–B, 1652, 1656A–B, 1938, 1939, 1940, 1943). CRC directed some of its suppliers to ship goods on its behalf to other companies or to consumers situated outside of the states in which the suppliers were located (Taubes 2266–67; *see, e.g.*, CX's 1171–75, 1206–11, 1223–27, 1228–29, 1231–33). CRC sold and shipped its products to consumers located throughout the United States (CX 1236C; Third CRC Admissions, Request 38). Thus, CRC has been and is engaged in a course of trade in or affecting commerce (Third CRC Admissions, Request 36; CRC Sanctions, pp. 3–4). **[16]**

II. REPRESENTATIONS ALLEGED

A. Contests

59. MDC has represented that it has conducted contests or sweepstakes (Complaint ¶ ¶ 6(1), 7(1); *e.g.*, CX's 65, 111A–B, 1326, 1332A–B, 1353A, D, 1367A–B, 1702, 1711A–B, 1716A–B). This representation was explicitly made, for example, in the following direct mailings to consumers:

> (a) Your sweepstakes entry into our Washington Post Magazine Contest. . . . (CX 1313A.)
>
> (b) MDC Contest Award Division. (*E.g.*, CX's 1317, 1319, 1326, 1327, 1331A, 1701A, 1702, 1705, 1719.)
>
> (c) Do you recall the day that you entered our Sewing Machine Super Sweepstakes Contest? (CX 1326.)
>
> (d) Dear Contest Winner: (CX's 1332A, 1356A.)
>
> (e) CONGRATULATIONS, YOU ARE A WINNER! You will recall that you recently entered our free SUPER SWEEPSTAKES. (CX 1353A.)
>
> (f) Congratulations: It is indeed my pleasure to inform you that your lucky number has been computer selected as a Sweepstakes prize winner. (CX 1367A.)
>
> (g) [G]iant $300,000 Sweepstakes Contest. (CX 1332A.)

60. MDC disseminated this representation through mass solicitations. For instance, it mailed out about five million solicitations between October 1971 and December 1972, informing recipients that they had won a Treasure Chest (CX's 743A, 1701). In other solicitations, MDC stated that each entrant was an "Instant Winner" in MDC's "Sewing Machine Sweepstakes" (CX's 1730A–B, 1731A–B,

1732A–B); these solicitations totalled at least 4.2 million between September 1973 and May 13, 1974 (CX 1700A–B). [17]

61. On April 25, 1973, Raymond Anderson instructed Joseph Anderson to print 297,000 solicitations to follow up sweepstakes entries and to mail to potential customers who did not respond to various previous mailings (CX 726). In November 1973, MDC was planning to mail follow-up solicitations to 126,000 sweepstakes entrants (CX 693).

62. In numerous instances, the record shows that MDC has not conducted contests or sweepstakes as represented. In such instances, its solicitations were solely for the purpose of obtaining sales or leads for sales. Such solicitations constituted a systematic, retail sales business transacted through mass mailings, and did not involve any elements of skill or chance (*see* F. 110).

B. Specific Number of Contest Prizes

63. MDC has represented that it will award a specific number of products as contest prizes (Complaint ¶ ¶ 6(2), 7(2)). In a solicitation concerning its "giant $300,000 Sweepstakes," MDC stated:

> **[W]e will be awarding our grand prizes consisting of:**
>
> **10 Brand New 1970 Dodge Challengers**
>
> **50 23″ Zenith Chromacolor TV Consoles**
>
> **21,272 Keystone Camera Kits**
>
> **75 Samsonite 4-piece Luggage Sets**
>
> **100 Zodiac Watches (CX 1332B).**

64. The record evidence discloses that no automobiles or television sets were given away as prizes pursuant to this solicitation (Joseph Anderson 3979; Juanita Anderson 3872–73).

C. Market Research

1. *Market Development Corporation*

65. In its consumer solicitations, MDC has represented that it was engaged in market research and market analysis (Complaint ¶ ¶ 6(3), 7(3)). The letterfoot of the solicitations often contained the words: "CONTEST DEVELOPMENT [18]AND FULFILLMENT ● DIRECT MARKETING ● MARKET RESEARCH ● CONSUMER MOTIVATION ● COMPUTER EVALUATION OF MARKET POTENTIAL ● MARKET ANALYSIS ● DISTRIBUTOR DEVELOPMENT ON ALL LEVELS, LOCAL, NATIONAL AND INTERNATIONAL." (*e.g.*, CX's 65, 288A, 1332A, 1356A, 1701A, 1706A, 1716A).

66. The term "market research" connotes consumer research directed to probing the consumer for his or her attitude towards a product, including likes and dislikes, frequency of usage and other factors (Taubes 2288).

67. A. M. Sampling was a major Treasure Chest supplier to MDC (Fs. 14, 184). A. M. Sampling basically performed two types of functions. It provided actual market research to manufacturers by assembling and distributing kits of sample products and doing follow-up consumer research on the products. It also assembles promotional packages containing close-out and sample products which are sold in bulk to sales organizations that subsequently redistribute them to their customers for promotional purposes (Taubes 2231–33, 2236–39). MDC purchased promotional packages from A. M. Sampling (Taubes 2242–43).

68. The name "Market Development Corporation" itself, and in the context of the solicitations disseminated to consumers, constituted the representation that MDC was engaged in the business of market research and market analysis.

69. MDC was not involved in market research or market analysis, except insofar as it attempted to retail its own products and services. MDC was a retail mail order house engaged in the business of advertising, promoting, selling and distributing sewing machines, vacation certificates, boxes of household and cosmetic products, and trivets (Fs. 4, 6, 8).

70. Neither MDC nor its Treasure Chest supplier conducted any market research or market analysis in connection with the household and cosmetic product kits that were distributed to MDC customers (Juanita Anderson 3788; Taubes 2288–89).

2. *Columbia Research Corporation*

71. In its consumer solicitations, CRC has represented that it was engaged in market research and market analysis (Complaint ¶ ¶ 6(3), 7(3)). The letterfoot of the solicitations often contained the words: "MARKET RESEARCH ● COMPUTER MARKETING SERVICES ● DIRECT MARKETING ● MARKET ANALYSIS." (*e.g.*, CX's 39A, 82A, 93A, 124A, 147A, 156A, 169A, 174A, 335A, 810A, 2003A). [19]

72. A. M. Sampling was a major Treasure Chest supplier to CRC. See F. 67, for a description of the types of functions performed by A. M. Sampling. CRC purchased promotional packages from A. M. Sampling (Taubes 2264).

73. The name "Columbia Research Corporation" itself, and in the context of the solicitations disseminated to consumers, constituted the

representation that CRC was engaged in the business of market research and market analysis.

74. CRC is not involved in market research or market analysis, except insofar as it attempts to retail its own products and services. CRC is a retail mail order house engaged in the business of advertising, promoting, selling and distributing vacation certificates, boxes of household and cosmetic products, and miscellaneous other products or services (Fs. 21, 22, 26; CRC Sanctions, pp. 3-4).

75. Neither CRC nor its Treasure Chest supplier, A. M. Sampling, conducted any market research or market analysis in connection with the household and cosmetic product kits distributed to CRC customers (Taubes 2289; CRC Sanctions, pp. 3-4).

D. Incentive Promotions

1. *Market Development Corporation*

76. In solicitations sent to prospective customers, MDC has represented directly and indirectly that it was engaged in incentive programs or promotions (Complaint ¶ ¶ 6(4), 7(4)). MDC made this representation in the following statements:

> (a) This is an incentive program offer. (CX's 1330B, 1742B, 1744A.)
>
> (b) To acquaint you with the newest advances of modern sewing, our merchandising department has been authorized to include in this GIFT BOX a special GIFT CHECK. (CX 1739A.)
>
> (c) Naturally all of our participating co-sponsors are very proud of their products and feel that through this program you will have an opportunity to acquaint yourself first hand with their many fine products, including fun-filled exciting vacation facilities. (*E.g.*, CX's 1701B, 1706B, 1716B, 1726.) [20]

77. MDC made this representation in millions of solicitations that were disseminated to consumers. For example, MDC mailed out its solicitation No. 123ER (CX 1726; F. 76(c)) to approximately eight million households between April 1973 and May 13, 1974 (CX 1700A).

78. MDC did not have a contractual relationship or any other business relationship with any of the manufacturers who were depicted as co-sponsors and were referred to as such in its solicitations except solely as a direct or indirect purchaser of their goods and services (Fs. 86, 87).

79. MDC did not engage in incentive programs or promotions and made no special or incentive offers to prospective customers. Rather, MDC was in the business of selling sewing machines, vacation certificates, Treasure Chests and trivets (F. 6).

2. *Columbia Research Corporation*

80. In solicitations sent to prospective customers, CRC has expressly represented that it was engaged in incentive programs or promotions (Complaint ¶ ¶ 6(4), 7(4)) by making the affirmative statement, "This is an incentive program offer." (*e.g.*, CX's 39D, 53D, 82D, 93D, 125, 147C, 156D, 169D, 174D, 335D, 810D, 2003D).

81. Customers of CRC believed this representation with respect to hotels and casinos in Las Vegas (Blackmore 689; Andrews 785; Cain 866), and often viewed CRC's goods and services as being of a promotional nature and as a form of advertising (Cain 866; Stipulation, p. 2).

82. CRC did not have a contractual relationship or any other direct business relationship with any of the manufacturers who were depicted as co-sponsors of its offers except solely as a direct or indirect purchaser of their goods and services (Fs. 90, 91).

83. CRC did not engage in incentive programs or promotions and made no special or incentive offers to prospective customers. CRC is in the business of selling vacation certificates, Treasure Chests, blackjack books and memberships in a consumers' buying club (F. 21; CRC Sanctions, pp. 3–4). [21]

E. Co-Sponsorship and Representation of Other Companies

1. *Market Development Corporation*

84. In its consumer solicitations, MDC has represented that it had co-sponsors and that it represented other companies (¶ ¶ 6(5), 6(6), 7(5), 7(6)). MDC made this representation through statements such as:

> (a) All of our participating co-sponsors are contributing their share toward this fabulous sweepstakes. It is only through their combined advertising budgets, along with ourselves, Market Development Corporation, that makes this entire presentation possible. Naturally, all of our participating co-sponsors are very proud of their products and feel that through this program you will have an opportunity to acquaint yourself first hand with their many fine products, including fun-filled exciting vacation facilities. (*E.g.*, CX's 111B, 288B, 733B, 1367B, 1701B, 1716B, 1721B, 1747E.)
>
> (b) Leading companies and hotels are cooperating in this program to acquaint you, first hand, with their offerings . . . . Market Development Corporation has been selected to make these gift offerings available to you. . . . (CX 1729A.)
>
> (c) Market Development Corporation acquires these fine products and fun-filled exciting vacation opportunities at a minimum cost from independent companies who in turn obtain them from manufacturers in exchange for the definite promise that their products will be distributed to a desirable cross section of consumers. (*Eg.*, CX 1711B.)

85. MDC also made this representation in conjunction with its use

of the Hunt-Wesson Foods, Inc. name. In addition to distributing a questionnaire dealing with Hunt-Wesson products together with product coupons, MDC represented in its literature that Hunt-Wesson was sponsoring the promotion offered by MDC to consumers (Pill 584–86, 597–98; Ryan 1041–44; CX's 110, 117, 118A–C). [22]

86. MDC did not have any contractual relationship or other direct business relationship with manufacturers and suppliers of goods and services distributed by MDC to its customers except as a direct or indirect purchaser of the goods and services. These manufacturers and suppliers neither considered themselves co-sponsors of MDC's program nor considered MDC to be their co-sponsor (Karniol 2052–57, 2069, 2111–12; Nolan 994, Ryan 1044–45; Selman 4473, 4480, 4486–87; CX's 116, 118C).

87. Thus, MDC neither represented other companies nor had co-sponsors. Both Hunt-Wesson Foods, Inc. and Walt Disney Productions specifically disclaimed any connection with MDC and demanded that MDC cease using their names in its literature because of the false impression generated among consumers as to their connection with MDC (CX's 116, 118C, 732, 1747A–B, H–I, 1749A–B; Nolan 994).

2. *Columbia Research Corporation*

88. In its consumer solicitations, CRC has represented that it had co-sponsors and that it represented other companies (Complaint ¶ ¶ 6(5), 6(6), 7(5), 7(6)). CRC made this representation through phrases such as:

> (a) Participating sponsors. (*E.g.*, CX's 53B, 124B, 169B, 278B, 1668B, 2031B).
>
> (b) Our clients. (CX's 376C, 503C).
>
> (c) Client-sponsors. (*E.g.*, CX's 335A, 346A, 397A, 413A, 478A, 498A, 526A, 595A, 1980A, 2000A, 2003B).
>
> (d) Las Vegas is one of the biggest and best promoters around. . . . That's why they have authorized me to offer a limited number of Vacations for Two. (*E.g.*, CX's 32C, 39A, 82A, 283E, 712A, 1389A, 1802A, 1869A.)

89. Some of CRC's customers believed this representation (Cesario 2577; Holtzman 2641–42; Otner 2885; Birch 2994; Gerstad 3278; Stipulation, p. 2).

90. CRC did not have any contractual relationship or other direct business relationship with manufacturers and suppliers of goods and services distributed by CRC to its customers except as a direct or indirect purchaser of the goods [23]and services. These manufacturers and suppliers neither considered themselves co-sponsors of CRC's

program nor considered CRC to be their co-sponsor (Nolan 994–95; McGuire 2429–31; Selman 4474, 4480, 4486–87; CX 1636; CRC Sanctions, pp. 3–4; Third CRC Admissions, Requests 7–8, 47–48).

91. Thus, CRC neither represented other companies nor had co-sponsors. For instance, Dow Chemical had specifically disclaimed any connection with CRC (CX 1636).

F. Special Selection

1. *Market Development Corporation*

92. In its consumer solicitations, MDC has represented that recipients of its offers had been specially selected. (Complaint ¶ ¶ 6(8), 7(8)). For example, MDC made this representation through statements such as:

> (a) Since your entry has been selected in our national sweepstakes I am sure you will be anxious to take advantage of this once in a lifetime offer. (CX 65B; *see, e.g.*, CX's 1331B, 1711B, 1741B.)
>
> (b) [I]n the process of selecting a first prize winner in the National Sweepstakes Drawing, your name was also computer selected. (*E.g.*, CX's 111A, 288A, 1716A, 1721A.)
>
> (c) [Y]our lucky number has been computer selected as a Sweepstakes prize winner. (*E.g.*, CX's 733A, 1367A, 1701A.)
>
> (d) [O]ur computers have selected [your] magic house number . . . . YOU ARE TO RECEIVE THE FOLLOWING: . . . . [T]oday is indeed your lucky day. (CX 1725.)

93. MDC did not select a limited number of consumers to receive its promotional offers. Rather, MDC disseminated its solicitations by means of mass mailings. Millions of consumers throughout the United States received essentially identical offers from MDC (F. 8). For instance, eight million vacation and Treasure Chest solicitations [24] (CX's 1725, 1726A–B) were sent by MDC to consumers between April 1973 and May 13, 1974 (CX 1700A); each such solicitation contained the statement, "our computers have selected [your] magic house number" (CX 1725), implying that the recipient was specially selected. MDC mailed out approximately five million Treasure Chest solicitations (CX 1701A–B) between October 1971 and December 1972, informing each recipient that "your lucky number has been computer selected as a Sweepstakes prize winner" (CX's 1701, 1701A). In fact, MDC mailed out approximately 10.2 million solicitations of various kinds between January 1, 1973 and May 13, 1974, all making the representation to the consumer that he or she had been specially selected (CX's 1700A–B, 1705, 1706A, B, 1710, 1711A, B, 1715, 1716A, B, 1720, 1721A, B, 1725, 1726A–B, 1733A, B, 1738A, D, 1740, 1741B). The 14 million households

to whom MDC sent solicitations during this time period constituted about 20% of the 68.2 million households in the United States for 1973 (CX 1143).

94. There were no "lucky numbers." The registered numbers on the vacation certificate order forms identified the particular magnetic tape being used and the sequential position of the customer's name on that tape. For example, the registered number 165–027228 found on CX 835 means that the customer with that number was the 27,228th name on tape 165 (Sarbaugh 3657–59).

95. To further illustrate the fact that MDC was concerned with presenting its offers to as many consumers as possible rather than to a select few, MDC stated in its solicitations that recipients could transfer the Holiday Vacation Gift Certificate to another couple (*e.g.*, CX's 1703B, 1706C, 1708B, 1712A, 1713B, 1723) or invite another couple along on the vacation for $15.00 extra using the additional order forms provided (CX's 1726B, 1727A).

96. Therefore, MDC did not specially select the recipients of its offers.

2. *Columbia Research Corporation ("CRC")*

97. In its consumer solicitations, CRC has represented that recipients of its offers had been specially selected (Complaint ¶ ¶ 6(8), 7(8)). For example, CRC made this representation through statements such as:

> (a) [Las Vegas has] authorized me to offer a limited number of Vacations for Two. And . . . the computer selected *your name* among others, as the lucky person to receive this invitation. . . . (*E.g.*, CX's 32C, 39A, 82A, 712A, 1389A, 1802A.) [25]
>
> (b) Today's a lucky day for you. Because our computers have selected [name of recipient] . . . . The computer has programmed your lucky registration number for you to receive . . . . (*E.g.*, CX's 272A, 1678E, 1678K.)
>
> (c) YOU ASK—WHY HAS THE COMPUTER SELECTED ME? (*E.g.*, CX's 272B, 1678F, 1678L.)
>
> (d) [Y]our name has been selected by our computer . . . . (*E.g.*, CX's 53A, 93A, 124A, 169A, 278A, 1668A.)
>
> (e) [Y]our name has been selected by the computer of our consumer research company. . . . (*E.g.*, CX's 32C, 39A, 82A, 335A, 397A, 467A, 524A, 712A, 1389A, 1802A.)
>
> (f) BECAUSE YOU HAVE BEEN SELECTED . . . . (*E.g.*, CX's 82A, 93E, 283E, 712A, 1389A, 1802A.)
>
> (g) You may be asking yourself—why has the computer selected me? (*E.g.*, CX's 335A, 397A, 467A, 524A.)

98. CRC did not select a limited number of consumers to receive its promotional offers. Rather, CRC disseminated its solicitations by means of mass mailings. Millions of consumers throughout the United States received essentially identical offers from CRC (Wray 5245, 5247; CRC Sanctions, pp. 3–4).

99. There was no special computer selection of recipients of CRC's offers. CRC merely selected the mailing lists which it felt would contain the names of those categories of customers who would be most likely to respond to CRC's solicitations (Fs. 22, 23, 25; Sutton 4227; CX 1086).

100. Furthermore, Invite-a-Friend forms were routinely sent by CRC to many consumers (*e.g.*, CX's 196A, 208, 284B, 1678, 1678H, 1830A; Third CRC Admissions, Requests 9–10). Some of CRC's customers did not receive solicitations but, rather, purchased the vacations through CRC's Invite-a-Friend program (Stipulation, p. 2, n.2).

101. Therefore, CRC did not specially select the recipients of its offers (CRC Sanctions, pp. 3–4). **[26]**

G. "Once In a Lifetime" Opportunities

102. In its consumer solicitations, MDC has represented that its offer was a "once-in-a-lifetime" opportunity (Complaint ¶ ¶ 6(12), 7(12); *see* CX's 65B, 1331B, 1711B, 1739A, 1741B).

103. However, MDC frequently sent more than one mailing of its promotional offers to the same individual, including repeat mailings to consumers who had not responded to a first mailing (CX's 726, 820, 848, 853, 854, 855; Sarbaugh 3671–77). Thus, MDC did not present consumers with "once-in-a-lifetime" offers.

H. Contest Winners

1. *Market Development Corporation*

104. MDC has represented that recipients of its solicitations were contest or sweepstakes winners (Complaint ¶ ¶ 6(7), 7(7)). For example, MDC made the following references in its solicitations:

(a) Dear Sweepstakes Winner: (*E.g.*, CX 65).

(b) Dear Contest Winner: (*E.g.*, CX's 1332A, 1356A).

(c) [E]ligible contest winner. (*E.g.*, CX's 1313B, 1332B, 1356B, 1367B).

(d) [Y]our contest winning certificate. (*E.g.*, CX 1313B).

(e) As a Lucky Sweepstakes winner you. (*E.g.*, CX 1332A).

(f) [M]y contest winnings. (*E.g.*, CX 1332E).

(g) [M]y Sweepstakes winnings. (*E.g.*, CX 1368A).

(h) CONGRATULATIONS, YOU ARE A WINNER. (*E.g.*, CX 1738A).

105. Small Business Data Processing Corporation, a firm providing data processing, computer letter writing and mailing list maintenance services to its customers (Sarbaugh 3624), received instructions from MDC to stamp "WINNER" on the filled-in entry blanks returned by consumers to MDC. These entry blanks were the basis of other forms sent back to consumers soliciting purchases (CX 1593; Sarbaugh 3662–64). [27]

106. As to these representations, MDC did not conduct bona fide contests or sweepstakes; such solicitations were solely for the purpose of obtaining sales or leads for sales (F. 62). Thus, recipients of MDC's solicitations were neither sweepstakes nor contest winners.

2. *Columbia Research Corporation*

107. CRC has represented that recipients of its solicitations were winners (Complaint ¶ ¶ 6(7), 7(7)), when, in actuality, those recipients had not won anything (*see* Fs. 112–14; CRC Sanctions, pp. 3–4).

108. Some consumers believed that they were winners (Maccarrio 3025–26; Huber 3085).

I. Prizes, Awards, Winnings, Gifts, Bonuses, Free Goods and Services

1. *Market Development Corporation*

109. MDC has represented that recipients of its solicitations were entitled to "awards," "gifts," "prizes," "winnings," "bonuses," and/or "free" goods and services (Complaint ¶ ¶ 6(9), 7(9)). MDC made these representations through the use of such terms as:

(a) Awards (*E.g.*, CX's 1331A, 1332A, C, D, E, 1367A–B.)

(b) Gifts (*E.g.*, CX's 1313A–B, 1326, 1331A–B, 1337B, 1353A, 1356A–B, 1367B.)

(c) Prizes (*E.g.*, CX's 1313A, 1319, 1332A–B, 1356A, 1367A–B, 1368A.)

(d) Winnings (*E.g.*, CX's 1313B, 1332B, E, 1353D, 1356B, 1367B, 1368A.)

(e) Bonuses (*E.g.*, CX's 1313A–B, 1326, 1330B, 1331A–B, 1337A, 1353A, 1357, 1367B, 1368A.)

(f) Free (*E.g.*, CX's 1313A, 1331A, 1337A, 1357A, 1357, 1368A.)

110. MDC did not conduct actual contests or sweepstakes (F. 62). Rather, MDC's solicitations presented consumers with offers that had obligations attached to them. For instance, in certain solicitations a customer would have to purchase a vacation in order to receive a "free" Treasure Chest; in other solicitations a customer would have to purchase a Treasure Chest in order to get a "free" vacation (CX 1703A, 1729A–B). On other occasions, a customer would have to purchase [28]a sewing machine or Treasure Chest in order to receive a "free" vacation and/or trivet (CX 1330A–B; Flach 3569; Harris 5152–53). Each transaction between CRC and a consumer carried with it a monetary obligation on the part of the consumer to pay the purchase price of either a sewing machine, a vacation certificate or a Treasure Chest (*e.g.*, CX's 1330A–B, 1703A, 1729A–B).

111. Thus, the recipients of MDC's offers were not entitled to any "prizes," "awards," "winnings," "gifts," "bonuses," and/or "free" goods and services. On the contrary, they were only entitled to purchase them at MDC's stated retail price.

2. *Columbia Research Corporation*

112. CRC has represented that recipients of its solicitations were entitled to "gifts," "bonuses," and/or "free" goods and services (Complaint ¶ ¶ 6(9), 7(9)). CRC made these representations through the use of such terms as:

(a) Gifts (*E.g.*, CX's 349A, C, D, 354A, C, D, 376A, C, D, 397A, D, 413A, C, D, 467A, D, 1677D.)

(b) Bonuses (*E.g.*, CX's 349A, 354A, 376A, 397A, 413A, 467A, 1389C.)

(c) Free (*E.g.*, CX's 304C, 349A, C, 354A, 376B, C, 1389C, 1677A, C.)

In certain solicitations, CRC implied that consumers would be receiving free goods and services in the following statement:

> You may be asking yourself—why has the computer selected me? How can I check into a deluxe hotel and check out without paying the cashier a cent—plus get all the other money—saving benefits? (*E.g.*, CX's 335A, 349A, 397A, 413A, 467A, 509A.)

CRC also made the representation that recipients of its solicitations would receive a free vacation (F. 120). [29]

113. Each CRC customer had to purchase CRC's vacation package in order to receive the Gift Carton. Receipt of the Gift Carton, therefore, carried with it a monetary obligation on the part of the consumer, namely, payment of a $15.00 or $15.95 fee (*e.g.*, CX's 304B, 335D, 349C, 354C, 376C, 413C, 467D, 1677B).

114. Thus, the goods and services offered by CRC are neither free nor gifts nor bonuses (CRC Sanctions, pp. 3–4).

J. Free Vacation

1. *Market Development Corporation*

115. MDC has represented that it was offering a free vacation to the recipients of its solicitations (Complaint ¶ ¶ 6(13), 7(13)). The representation was made by including a certificate with the solicitation bearing the words "FREE VACATION" in bold red print on its face (CX's 1357, 1368A, 1703A). In addition, the solicitations contained words such as "special free vacation activities" (CX 1741A) and described recipients of the vacation offer as sweepstakes and contest prize winners (*e.g.*, CX's 1356A, 1367A, 1701A, 1740; Fs. 104, 105). The $15.00 cost to the consumer is described by MDC as a registration, handling and service charge (F. 130).

116. In order to receive the "free" vacation offered by MDC, consumers were required to pay at the outset the aforementioned $15.00 fee (*e.g.*, CX's 1367B, 1368A, 1701B, 1703A).

117. Moreover, MDC required its customers to pay their own transportation costs and additional charges in some instances during peak season, facts which were disclosed only in the fine print usually contained at or near the end of MDC's solicitations materials (*e.g.*, CX's 1367D, 1368B, 1703B, 1723).

118. In order to take advantage of all the benefits of MDC's "free" vacation package, customers would have to visit numerous business locations which were frequently geographically distant from one another; customers would also have to spend their own money at each place of business. MDC's solicitations did not inform consumers of these conditions (F. 162).

119. In light of the above findings of fact, recipients of MDC's offers were not offered and did not receive free vacations. [30]

2. *Columbia Research Corporation*

120. CRC has represented that it was offering a free vacation to the recipients of its solicitations. (Complaint ¶ ¶ 6(13), 7(13)). For example, this representation was made through the use of words and phrases such as:

> (a) [D]eluxe accommodations for two paid for in full. (*E.g.*, CX's 53A, 169A, 2031A.)
>
> (b) Are You in For a Big Jackpot Surprise! ! ! ! (*E.g.*, CX's 53A, 169A, 2031A.)

(c) Anytime a *casino* is giving away free rooms and money. (*E.g.*, CX's 156C, 224C, 304C, 1677C.)

(d) [A] 3-DAY-HOLIDAY-FOR-TWO "on the house." (*E.g.*, CX's 174A, 224A, 304A, 810A, 1677A.)

121. In order to receive the "free" vacation offered by CRC, consumers were required to pay at the outset a $15.00 or $15.95 fee which was designated as a registration, handling and service charge (*e.g.*, CX's 53B, D, 156B, 169B, 174B, 224B, 304B, 810D, 1677B, 2031B, D; Fs. 28, 132).

122. CRC required its customers to pay their own transportation costs, a fact disclosed only in the fine print on the solicitations and/or buried in the four pages of the solicitations (*e.g.*, CX's 32E, F, 39C, D, 53D, 82C, D, 2031D, 2037).

123. CRC and its agents have also often required customers to submit a refundable room deposit of $10.00 to $25.00 in order to confirm their reservations (*e.g.*, Peters, 45–46; CX 105; Williamson 117–18; CX 1392; Janov 285–87; CX 59; Gross 351–53; Rees 400–01, 415; CX 120A; Lawley 448–49; CX 1760A; Bratschi 638; Szitkar 744; CX 146; Dworak 908; CX's 306, 309; Bryan 1142–43; CX 257; Breece 1189–90; CX's 194, 198A; Torres 1374; Benun 1454; CX 220; Hellor 1569–70; CX 50; Darrah 1734, 1752; CX 285; Engleman 2498–2500; CX's 401, 402; Joseph Anderson 4079–80; Stipulation, p. 5).

124. In many instances, the room deposit requirement was not disclosed at all to consumers until after they sent in their initial $15.00 or $15.95 fee (*e.g.*, CX's 53, 194, 304, 1392, 1677D, 2031D); on some occasions, the deposit requirement was disclosed only in the fine print usually contained at the end of CRC's solicitations material (*e.g.*, CX's 156D, 169D, 224D, 810D, 2031D). [31]

125. The deposit was to be refunded to the customer either in cash or in casino script (*e.g.*, CX's 59, 204B, 319; Joseph Anderson 4080–81). In some instances, customers who had paid a deposit either never received a refund of their deposit or received a refund only after a considerable time period had elapsed, or after they had contacted various consumer protection groups and/or written several letters to CRC (*see, e.g.*, Lawley 466–67, 473–74; CX 1771; Dworak 919–20, 935, 938; CX's 315–17; Bryan 1142–45, 1156; Heller 1572, 1579–81).

126. CRC's customers often had to pay additional charges for their hotel room beyond what was disclosed in the initial solicitation. Such charges included the room tax and peak season or extra charges of $5.00 per person per night. (Joseph Anderson 4064–65 *see, e.g.*, Lawley 485; Bratschi 644; Blackmore 694; Dworak, 934–36; Bryan, 1145–46; CX 275). In some instances, CRC's solicitations did not disclose the

existence of any such additional charges, including the existence of "peak season charges" or charges for weekend arrivals (*e.g.*, CX's 53, 156, 169, 224, 304, 810, 1677); the customer first learned of these extra charges when he or she received a reservation request form or reservation confirmation (*e.g.*, Gorman 182, 189–90; CX's 31A–B, 35A–B; Rees 393–94; CX 129; Holmes 509; Bratschi 644–45; Blackmore 694; Dworak 934, 936; Horton 1084–85; Bryan 1145–46; CX 275; CX's 46A–B, 48; CX 165; Darrah 1739–40; CX 1989; Stipulation, p. 7, n.17).

127. CRC and its agents told some consumers that there would be an additional fee for changing reservation dates even though it was CRC or its agent who provided wrong or useless dates (*e.g.*, Lawley 460–62; CX 1766; CX 165).

128. In order to take advantage of all the benefits of CRC's "free" vacation package, customers would have to visit numerous business locations which were frequently geographically distant from one another; customers would also have to spend their own money at each place of business. CRC's solicitations did not inform consumers of these conditions (Fs. 165, 216).

129. In light of the above findings of fact, recipients of CRC's offers were not offered and did not receive free vacations. [32]

K. Registration, Handling and Service Charge

1. *Market Development Corporation*

130. In its consumer solicitations, MDC has represented that prospective customers were entitled to the goods and services offered for only a registration, handling and service charge of $15.00 (Complaint ¶ ¶ 6(10), 7(10)).

MDC made this representation by stating: "There is a $15.00 (total cost to you) service charge to supplement the cost" of registration, packaging, handling, freight charges, advertising and other miscellaneous costs (*e.g.*, CX's 288B, 1337B, 1368A, 1701B, 1703A, 1716B, 1717A, 1721B, 1722A).

131. The record evidence is insufficient to support complaint counsel's allegation (CPF 101) that the $15.00 registration, handling and service charge constituted all or part of the retail price of the goods and services offered by MDC; accordingly, no further finding can be made on this point.

2. *Columbia Research Corporation*

132. In its consumer solicitations, CRC has represented tha prospective customers were entitled to the goods and services offere

for only a registration, handling and service charge of $15.00 or $15.95 (Complaint ¶ ¶ 6(10), 7(10)).

CRC made this representation by making statements such as: "There is a very small charge of $15.00 (total cost to you) that we must charge to supplement the cost" of registration, confirmation, computer processing, handling and other miscellaneous costs (*e.g.*, CX's 53B, 169B, 1668B, 2031B; *see also*, *e.g.*, CX's 272D, 376C, 467D, 525C, 810D, 1677B, 1678H, 2003D).

133. The record evidence is insufficient to support complaint counsel's allegation (CPF 103) that the $15.00 or $15.95 registration, handling and service charge constituted all or part of the retail price of the goods and services offered by CRC; accordingly, no further finding can be made on this point.[5] [33]

L. Number of Customers

134. MDC has represented itself as having 340,000 customers (Complaint ¶ ¶ 6(16), 7(16)). MDC made this representation by stating that, "Within the last two years, over 340,000 families have taken us up on our offer, and over 48,000 have placed their second order." (CX's 1337B, 1726B).

135. The record evidence is insufficient to support complaint counsel's allegation (CPF 95) that MDC did not have 340,000 customers who accepted its offered goods and services; accordingly, no further finding can be made on this point.[6]

M. Limited Time

1. *Market Development Corporation*

136. MDC has represented that recipients of its consumer solicitations had a limited time within which to respond to the "offers" in the mailings, and that failure to meet the time limit would result in forfeiture of any right to "accept" such offers (Complaint ¶ ¶ 6(11), 7(11)). MDC made this representation through statements such as:

> (a) Unless I hear from you within the next 10 days, I must assume that you are not interested in taking advantage . . . . (*E.g.*, CX's 65B, 1313B, 1331B, 1337B, 1353D, 1711B, 1739D.)
>
> (b) Unless I hear from you within the next seven [or 10] days, I must assume that you are not interested in taking advantage . . . . At that time, I will be compelled to pass

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[5] It is noted that this allegation of the complaint (Complaint ¶ 7(10)) must be taken as established adversely to Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

[6] It is noted that this allegation of the complaint (Complaint ¶ 7(16)) must be taken as established adversely to Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

your winnings on to the next eligible contest winner. (*E.g.*, CX's 1332B, 1356D, 1367B, 1701B, 1733B, 1738D, 1741B.)

(c) I have enclosed complete details, along with acceptance form and a return envelope which must be sent to me within the next 10 days in the event you wish to accept this offer. (*E.g.*, CX 1725.) [34]

137. In view of the paucity of record evidence supporting this allegation of the complaint (CPF 97), no finding of fact can be made that recipients of MDC's offers did or did not have a limited time within which to claim the offered goods and services.[7]

2. *Columbia Research Corporation*

138. CRC has represented that recipients of its consumer solicitations had a limited time within which to respond to the offers in the mailings, and that failure to meet the time limit would result in forfeiture of any right to "accept" such offers (Complaint ¶ ¶ 6(11), 7(11)). CRC made this representation through statements such as:

(a) This is a very limited offer . . . . So you must act at once . . . . Unless I hear from you within the next 10 days I must assume that you are not interested in accepting. . . . (*E.g.*, CX's 53B–C, 93B–C, 124B–C, 169B–C, 2031B–C.)

(b) We ask you to act promptly and acknowledge this notification *within 10 days* to assure your eligibility for all your benefits. (*E.g.*, CX's 39D, 82D, 93H, 1802D, 1869D.)

(c) I can't promise to hold your computer-registered number longer than 10 days. (*E.g.*, CX's 335D, 346D, 509D.)

139. Some CRC customers believed this representation (Rees 386–87; Holmes 498; Bratschi 630; Tuber 822–23; Cain 867–68; Bryan 1130–31; Torres 1371; Cesario 2578; Otner 2886–87; Macario 3025; Gerstad 3279; Stipulation, p. 2). No time limit exists within which recipients of CRC's solicitations must remit their money. Recipients may make their purchases more than 10 days after receiving the solicitation (CRC Sanctions, pp. 3–4).

N. Vacation Times, Locations and Accommodations

1. *Market Development Corporation*

140. In its consumer solicitations, MDC has represented tha recipients could select a vacation at a time of their choosing (Complain ¶ ¶ 6(14), 7(14)). This representation was made through variations o such statements as: [35]

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[7] It is noted that this allegation of the complaint (Complaint ¶ 7(11)) must be taken as established adversely Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

(a) You have a full year to decide where and when you wish to take advantage of your Vacation Certificate. (*E.g.*, CX's 111B, 288B, 1367B, 1716B, 1721B.)

(b) You have one full year to take advantage of your Vacation for Two. (*E.g.*, CX's 1331B, 1332B, 1356B, 1741B.)

(c) [G]ood for one full year from date issued. (*E.g.*, CX's 1357B, 1368A, 1703A, 1708A, 1718A, 1737.)

(d) You don't have to make your reservations now. . . . You do this when you are ready to go on your vacation. You have a full year to decide. (*E.g.*, CX's 1337B, 1726B.)

141. In these consumer solicitations, MDC has represented that consumers could select a vacation at a location from among several choices. MDC usually presented prospective customers with a choice of three resort areas: Las Vegas, Nevada; Miami Beach, Florida; or Central Florida (Disney World, near Orlando) (*e.g.*, CX's 111A, 288A, 1331A, 1356A, 1701A, 1703A, 1706A, 1708A, 1722A, 1725, 1726A, 1729A, 1733A, 1741A). In addition, MDC also offered other locations, including Sarasota, Florida (*e.g.*, CX's 1744A, 1737, 1706A); New Orleans, Louisiana (*E.g.*, CX's 1332A, 1706A, 1737); St. Petersburg, Florida (*e.g.*, CX's 1706A, 1737, 1744A); Reno or Lake Tahoe, Nevada (*e.g.*, CX 1332); Palm Beach, Florida (*e.g.*, CX 1332A); Clearwater, Florida (*E.g.*, CX 1706A); and Ft. Lauderdale, Florida (*e.g.*, 1706A, 1744A).

142. MDC also has represented that recipients of its offers would receive accommodations at hotels or resorts of their choosing, including the Hacienda Hotel in Las Vegas and the Fontainebleau Hotel in Miami Beach (*e.g.*, CX's 111A-B, 288A-B, 1356A, 1367A-B, 1701A-B, 1703A, 1704B, 1708A-B, 1711A-B, 1718A).

143. Vacation accomodations provided by MDC were not always available for the particular time and/or location selected by the customer, and customers were asked to change their choices of times or locations in order to get accommodations (Juanita Anderson 3747-48). For instance, vacation accommodations for the Hacienda Hotel were not available through MDC (CX's 684, 682, 683, 685, 687). Furthermore, some of the vacation accommodations provided to customers by MDC were not for those cities or areas desired by the customers (CX's 1549-51). [36]

144. Thus, MDC's customers did not always have their choice of vacation times, locations or accommodations, with the actual arrangements made by MDC sometimes differing from customers' selections.

2. *Columbia Research Corporation*

145. In its consumer solicitations, CRC has represented that recipients could select a vacation at a time of their choosing (Complaint

¶ ¶ 6(14), 7(14)). This representation was made through variations on such statements as:

> (a) You have a full year to take advantage of your Vacation For Two . . . . (*E.g.*, CX's 32D, 39B, 82B, 283F, 1802B, 1869B.)
>
> (b) You don't have to make your reservations now. . . . You do this when you are ready to go on your vacation. You have one full year to decide. (*E.g.*, CX's 53B, 93B, 124B, 169B, 278B.)
>
> (c) You have a full year to decide where and when you use your Vacation Certificate. (*E.g.*, CX's 53C, 93C, 124C, 169C, 278C.)
>
> (d) If you act now, I can promise you all your benefits will be reserved for you to use anytime during the coming year. (*E.g.*, CX's 101C, 156C, 224C, 304C.)

146. CRC, in the regular course of business, opened and forwarded incoming orders to its computer service, Universal Data Systems, Inc., the same day (Jacobson 4946–48; F. 28). Universal processed those incoming orders, and printed vacation certificates and shipping labels in the regular course of business (F. 24). Universal Data Systems also printed reservation confirmations, normally three times per week (RX 62-231, -253).

147. Vacation accommodations provided by CRC and its agents were, and continue to be, unavailable for certain times of the year in certain locations. For instance, CRC's customers were not able to be accommodated in Las Vegas for Thursday, Friday, Saturday or holiday arrivals (CX's 218, 628, 778, 1089B–C, 1885; Joseph Anderson 4053–55; Bratschi 638–39; Banos 1664–69; Kegley 4811–12; Stipulation, p. 4, n. 8).

148. CRC and its agents repeatedly informed customers that the vacation dates they had requested were booked, [37]and that they should select alternate dates (Gorman 183–85; CX 31C; Andrews 790–91; CX 179; Tuber 824–29; CX's 1670–73; Horton 1085–87; CX 1791; Wiersma 1219–30; CX's 795–97, 1812, 1814, 1815, 1817, 1818; Benun 1428–30; CX's 218, 219; Riesenfeld 1616–17; CX's 1660, 1662). In at least one instance, a CRC customer was told, "The entire month of May is booked to capacity." (CX 1487).

149. The times selected for vacation accommodations would also be unavailable to some of CRC's Las Vegas customers because CRC oversold available accommodations (F. 258).

150. At times, CRC and its reservation agents gave consumers vacation accommodations far different from those they selected (*e.g.*, Gorman 187–90; Lawley 460–62; Cain 868–74; Bryan, 1137–40. *See also* Stipulation, p. 4, n. 8, and p. 5, n. 10; Joseph Anderson 4043–44).

151. CRC has represented that consumers could select a location of

their choice for their vacation. For instance, one solicitation made the following offer:

> A luxurious Family Vacation For Two with deluxe lodging at your choice of fabulous resort areas including Orlando, Florida—home of Walt Disney World—or Las Vegas or Puerto Rico. (*E.g.*, CX's 335A, 346A.)

Other solicitations offered location choices such as: Reno, Nevada (*e.g.*, CX 509B); St. Petersburg, Florida (*e.g.*, CX 346C); and Miami Beach, Florida (*e.g.*, CX 349C); (*see also, e.g.*, Brady 228; Gellhorn 2819).

152. Vacation accommodations provided to customers by CRC and its agents were not always for the requested locations (Cesario 2588–89; CX's 374A–B, 1971; Berliner 2694–98; CX's 1988, 1989, 1994A–B). Some customers were informed by CRC and its agents that reservations were unavailable for certain locations (*e.g.*, Berliner, 2699–2704; CX's 1997, 1998, 1999; Gellhorn 2836–40, 2845–46, 2862–65; CX's 422, 423, 1058; Stipulation, p. 5, n. 10).

153. CRC represented that recipients of its offer would be accommodated at specific hotels or resorts, including the California Hotel and Casino (*e.g.*, CX's 397B–C, 1980B–C), the El Conquistador Hotel (*e.g.*, CX's 346C, 467D) and the Bay Shores Yacht & Tennis Club (*e.g.*, CX's 503A, 536A–B). [38]

154. CRC's customers were not provided with vacation accommodations at the California Hotel and Casino or El Conquistador Hotel (Boyd 1816–17; Berger 4255–56; CX 343). Vacation accommodations for the Bay Shores Yacht & Tennis Club were unable to be provided; instead, over 50 units at the Gulf Towers Motel at Indian Rocks Beach, Florida, and the Gulf Towers North Motel at Clearwater, Florida, as well as rooms at the Ramada Inn at Sarasota, Florida, were allocated for this purpose (McGuire 2347–48, 2374–75, 2435–2436; CX 1927). In February or March 1976, accommodations became available at the Bay Shores Yacht & Tennis Club; however, only 10 units were available to CRC's vacation certificate customers (McGuire 2375, 2433–35).

155. CRC represented that those of its customers who chose to go to Las Vegas for their vacation would be accommodated on the "Strip" (*e.g.*, CX's 32D, 53A, 101A, 283F, 525B, 1802B).

156. The area of Las Vegas known as the "Strip" generally extends from the Sahara Hotel on the northern end of Las Vegas Boulevard South to the Hacienda Hotel on the southern end of Las Vegas Boulevard South (Boyd 1831–32; Jenni 1892; Ralenkotter 1989; Kegley 4745).

157. CRC's Las Vegas vacation customers were accommodated at the King 8 Hotel and Casino and other hotels (Joseph Anderson 4032–33; Stipulation, p. 4). The address of the King 8 is 3330 W. Tropicana

Avenue (CX 2065F). The King 8 is not located on the "Strip," although it is located nearby (Jenni 1892; Kegley 4746).

158. CRC also has represented that recipients of its offers would be accommodated at hotels or motels that were described using terms such as "deluxe" (*e.g.*, CX's 224A, 335A, 503A), "First Class" (*e.g.*, CX's 39B, 169A, 1802B), "First Rate" (*e.g.*, CX's 467C, 509C, 1908B), "First Class Deluxe" (*e.g.*, CX 2031C) and "Luxurious" (*e.g.*, CX 101A).

159. However, some customers of CRC testified that they were accommodated at less-than-average accommodations that did not meet the above criteria set forth by CRC in its solicitations (*e.g.*, Gross 353; Holmes 510–12; Bratschi 645–46; Blackmore 695; Wilson 3158–60).

160. Thus, CRC's customers did not always have their choice of vacation times, locations or accommodations, with the actual arrangements made by CRC or its agents sometimes differing from customers' selections. **[39]**

O. Vacation Coupons

1. *Market Development Corporation*

161. MDC has represented that the vacation coupons offered to customers were worth $50.00 or $100.00, depending on the particular solicitation (Complaint ¶ ¶ 6(23), 7(23)). MDC made this representation in the following statements contained in its consumer solicitations:

> (a) [A] $100.00 Food Allowance Discount [Coupon] Book. (*E.g.*, CX's 111A, 288A, 1313A, 1331A, 1356A, 1367A, 1701A, 1733A.)
>
> (b) *[O]ver $100.00* in Food and Entertainment Coupons. (*E.g.*, CX's 1337A, 1725, 1726A.)
>
> (c) $50.00 food allowance discount coupon book. (*E.g.*, CX's 1545A, 1716A, 1721A.)
>
> (d) [M]ore than $100.00 in valuable Vacation Discount Coupons, redeemable for food, tourist attractions, gifts . . . and much more. (*E.g.*, CX 1706B.)
>
> (e) $50.00 food and entertainment discount coupon book. (*E.g.*, CX 1711A.)

162. MDC did not disclose in its solicitations to consumers that, in order to receive the benefits of the coupons, consumers must make additional food, drink and other purchases such as two-for-the-price-of-one deals (*e.g.*, CX's 1752, 1753A–K, 1754A–Z9). The business enterprises listed on the MDC coupons ranged geographically from St. Augustine and Daytona Beach, Florida on the north (*e.g.*, CX 1753F, I, J) to Miami Beach on the south (*e.g.*, CX 1753B). Thus, MDC's customers would have to visit each place of business in order to realize the full value of the coupons.

163. Despite the above, MDC's representations concerning the monetary value of the vacation coupons were not of such a serious nature as to materially harm the public.

2. *Columbia Research Corporation*

164. CRC has represented that the vacation coupons offered to customers were worth over $100 (Complaint ¶ ¶ 6(23), 7(23)). CRC has made this representation by stating in its solicitations: "[Y]ou're going to get *over $100 in valuable Vacation Coupons to save you important dollars* on great restaurants, excursion boats . . . and much, much more." (CX's 376B, 503B; *see also* CX 2031C). [40]

165. CRC did not disclose in its solicitations to consumers that, in order to receive the benefits of the coupons, consumers must make additional food, drink and other purchases such as two-for-the-price-of-one deals (*e.g.*, CX's 1929–33, 2054A–I). The business enterprises listed on the CRC coupons ranged geographically from 49 miles north of Tampa, Florida, on the north (CX 2054F) to 23 miles south of Ft. Myers (CX 2054C). Thus, CRC's customers would have to visit each place of business in order to realize the full value of the coupons (CRC Sanctions, pp. 3–4).

166. Despite the above, CRC's representations concerning the monetary value of the vacation coupons were not of such a serious nature as to materially harm the public.

P. Sales of Sewing Machines

167. MDC has represented that the sewing machines offered in its consumer solicitations were sold throughout the United States (Complaint ¶ ¶ 6(17), 7(17)). MDC made this representation by stating in its solicitations that its "sewing machines are sold . . . in all 50 states" (CX's 65A, 1313A, 1331A, 1353A, 1733A, 1738A, 1739A, 1741A) and that they "will be selling across the land" (CX's 1332A, 1356A).

168. There is a paucity of record evidence to demonstrate whether or not the sewing machines offered by MDC were sold throughout the United States as alleged by complaint counsel (CPF 155); thus, no finding of fact can be made on this point.[8]

Q. Servicing of Sewing Machines

169. MDC has represented that its sewing machines were guaranteed for 25 years and would be serviced under this guarantee throughout the United States (Complaint ¶ ¶ 6(18), 7(18)). MDC made

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[8] It is noted that this allegation of the complaint (Complaint ¶ 7(17)) must be taken as established adversely to Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

this representation by stating in its solicitations to consumers that its "sewing machines are . . . serviced in all 50 states and have a 25-year guarantee bond (CX's 65A, 1313A, 1331A, 1353A, 1733A, 1738A, 1739A, 1741A). [41]

170. The only sewing machine repair department maintained by MDC was located at its Hauck Road plant in Cincinnati, Ohio (Juanita Anderson 3730, 3759–60; Flach 3513). Customers were supposedly allowed to have their machines serviced by independent sewing machine dealers and service centers, and to submit their bills to MDC for reimbursement. (Juanita Anderson 3759–60). However, MDC's sewing machine supplier, Riccar America Company, would not service sewing machines that did not bear the Riccar label, a category that included sewing machines purchased by MDC's customers (Elliott 1249–50, 1246–47, 1267–69, 1273–74; CX 923A–C).

171. Despite the above, the record evidence is insufficient to support complaint counsel's proposed finding (CPF 157) that the sewing machines sold by MDC were serviced only at MDC's Hauck Road plant in Cincinnati, Ohio; accordingly, no further finding on this point can be made.[9]

R. Use of Sewing Machines

172. MDC has represented that its sewing machines were used in home economics classes throughout the United States. (Complaint ¶ ¶ 6(19), 7(19)). MDC made this representation by stating to consumers in its solicitations that "the same . . . machine that [is advertised] is used in Home Economics classes of high schools throughout the country." (CX's 65B, 1313B, 1331A, 1353A, 1733B, 1738A, 1739A, 1741A).

173. MDC employees testified that they had no knowledge as to whether the sewing machines MDC marketed were used in home economics classes throughout the United States (Joseph Anderson 3974–75; Harris 5141). MDC's supplier of sewing machines, Riccar, did not sell to school districts those models of sewing machines purchased by MDC, nor did Riccar ever provide anyone at MDC with any information about the use of its sewing machines in schools or home economics classes (Elliott 1278–80, 1267–69, 1273–74; CX 923A–C).

174. Despite the above, the record evidence is insufficient to support complaint counsel's proposed finding (CPF 159) that the sewing machines sold by MDC were used in home economics classes

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[9] It is noted that this allegation of the complaint (Complaint ¶ 7(18)) must be taken as established adversely to Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

throughout the United States; accordingly, no further finding on this point can be made.[10] [42]

S. Retail Price of Sewing Machines

175. MDC has represented that the sewing machines offered in its consumer solicitations had a retail price of either $179.50 or $169.50 (Complaint ¶ ¶ 6(20), 7(20)). MDC made this representation through use of the following statements in its solicitations:

(a) Regular Price $169.50. (CX's 64A, 65A, 1313A, 1733A, 1736.)

(b) Regular Price $179.50. (CX's 1353A, 1738A.)

(c) Comparable value $179.50. (CX's 1331A, 1730A, 1731A, 1732A, 1741A.)

(d) Retail value $179.50. (CX's 1730B, 1731B.)

(e) Comparable retail value $179.50. (CX's 1330A, 1742A.)

(f) Nationally advertised price of $179.50. (CX 1739A.)

176. The only prices which consumers paid for sewing machines ordered from MDC through the mail were $69.95 and $79.95 (Flach 3528, 3499; Harris 5103–04).

177. On November 13, 1973, Raymond Anderson, in his capacity as president of MDC, wrote to Mickey Veraldo of G.C.L. Mercantile Corp., a New Jersey firm that shipped the Riccar Good Housekeeper 308 sewing machines to MDC, attempting to persuade G.C.L. to sell or at least advertise that machine at "$179.00 or more" and offering MDC's services in placing any such advertisements (CX 693A–B; Harris 5103).

178. MDC sold the Riccar Good Housekeeper model 308 sewing machines during the period when it conducted in-home sales solicitation as well as in the subsequent period of mail order sales. MDC's sales personnel sold this sewing machine to consumers in their homes for $189.95 (Harris 5028–32, 5097–98, 5100–01; *see also* Joseph Anderson 3980).

179. The record evidence is insufficient to support complaint counsel's proposed finding (CPF 125) that the sewing machines [43] purchased by consumers from MDC for $79.50 or $69.50 through mail order solicitations did not have a retail price of $179.50 or $169.50; accordingly, no further finding on this point can be made.[11]

T. Sewing Machine Discount Certificates

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[10] It is noted that this allegation of the complaint (Complaint ¶ 7(19)) must be taken as established adversely to Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

[11] It is noted that this allegation of the complaint (Complaint ¶ 7(20)) must be taken as established adversely to Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

180. In its consumer solicitations, MDC has represented that it was providing prospective customers with discount certificates worth up to $100.00 toward the regular retail price of its sewing machines (Complaint ¶ ¶ 6(21), 7(21)). MDC distributed such certificates in $75.00 or $100.00 denominations (*e.g.*, CX's 1327, 1332C, 1357, 1734, 1745), and characterized them in terms such as:

(a) [C]ash merchandise certificate. (CX's 1367B, 1701B, 1711A, 1716A, 1721A.)

(b) [C]ash merchandise gift certificates. (CX's 1332A, 1356A.)

(c) Discount Certificate. (CX's 1329, 1332C, 1353A, 1738A, 1743A–B.)

(d) Cash Merchandise Discount Certificate. (CX's 1313A, 1353A, 1733A, 1738A, 1740, 1741A.)

(e) Sweepstakes Discount Certificate. (CX's 1313A, 1733A, 1741A.)

181. These sewing machine discount certificates were mailed along with MDC's sewing machine solicitations (Joseph Anderson 3981–82). A large number of discount certificates were printed (Joseph Anderson 3980–81). Over 10.9 million sewing machine certificates were offered to consumers in MDC's solicitations, with each recipient either receiving a certificate along with the solicitation or being assured of receiving a certificate upon entering MDC's alleged contest (CX's 1700A–B, 1701, 1701B, 1710, 1711A, 1715, 1716A, 1720, 1721A, 1730B, 1731B, 1732B, 1733A–B, 1734, 1738A, 1739A, D, 1740, 1741A–B). [44]

182. The record evidence is insufficient to support complaint counsel's proposed finding (CPF 107) that MDC's sewing machine discount certificates were worthless (*see* Fs. 175–79). Accordingly, no further finding on this point can be made.[12]

U. Value of Treasure Chests and Gift Cartons

1. *Market Development Corporation*

183. MDC has represented that the Treasure Chest offered to consumers in its solicitations had a value of more than $30.00 (Complaint ¶ ¶ 6(22), 7(22)). MDC made this representation through the use of the following statements contained in its solicitations:

(a) [A]t least *$35.00* in nationally advertised value. (CX's 1337A, 1726A.)

(b) [A] $36.28 value in itself. (CX 1706B.)

(c) [T]he $36.28 Treasure Chest of Advertised Values. (CX's 1706D, 1708A.)

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[12] It is noted that this allegation of the complaint (Complaint ¶ 7(21)) must be taken as established adversely to Raymond Anderson in his personal capacity (Raymond Anderson Sanctions, p. 2).

(d) [The] advertisers . . . guarantee the advertised and selling price to be over $30. (CX 1729.)

184. Selective Sampling, a supplier of Treasure Chest kits to MDC (Fs. 14, 67), attempted to maintain a minimum value of $7.00 to $8.00 in the kits, exclusive of the perfume included therein (CX's 748, 749, 750; Karniol 2043–44, 2094). The company assigned this value range to the items in the Treasure Chest based on manufacturers' suggested retail prices which were obtained from various publications; Selective Sampling did not use discounted prices at which the items may have been offered at some discount retail outlets (Karniol 2045–46).

185. During the course of the relationship between MDC and Selective Sampling, some of the Treasure Chests shipped to consumers came to contain fewer products and products of lesser quality and lesser value because manufacturers directed Selective Sampling not to use their products in its kits because of consumer complaints (Karniol 2093–94, 2129–32). [45]

186. Value Package, another supplier of Treasure Chest kits to MDC (F. 14), assigned values to the items in the kits of between $11.44 and $15.49, except for one kit valued at $24.25, and informed MDC of those assigned values and how they were determined (CX's 978–86; Taubes 2258–59). Value Package determined the value of the products in the kit by assigning either manufacturers' suggested retail prices, the actual prices at which the products were sold nationally or, for products smaller than regular retail size, a value calculated upon the fractional equivalent of the contents compared to the smallest regular retail size. If a product had both a manufacturer's suggested retail price and an actual selling price, then Value Package would use the suggested retail price as the value even though it might be higher than the actual selling price (Taubes 2253–57). Value Package made no attempt to verify that products were actually sold at the suggested retail prices which were used in making the valuations (Taubes 2257–58).

187. Value Package provided MDC with the assigned values for the products in the kits because MDC wanted its kits to have a certain value and wanted back-up material regarding that value; MDC was also informed of the methods used in computing the assigned values (Taubes 2258–59). MDC suggested that the kits contain approximately $15.00 worth of merchandise, excluding perfume (Taubes 2278–79, 2302, 2310). This was the only information provided to MDC by Value Package concerning the value of the kits (Taubes 2259).

188. Grafton Products supplied the perfume for MDC's Treasure Chests (Fs. 15, 199). The perfume did not have the retail value claimed inasmuch as it was never placed on the retail market for sale. In fact,

MDC purchased the perfume at a cost of approximately 33 to 40 cents per bottle (Fs. 199, 204). Inclusion of the perfume in the kits did not add significantly to the value of the Treasure Chest.

189. Therefore, the record evidence supports the finding that MDC artifically inflated the value of the Treasure Chest. The value was significantly less than $30.00.

2. *Columbia Research Corporation*

190. CRC has represented that the Super Jackpot Package and Gift Carton offered to consumers in its solicitations had a value of at least $25.00 and as much as $40.00 (Complaint ¶ ¶ 6(22), 7(22)). CRC made this representation through use of the following statements: [46]

> (a) [A] *$40 Gift Carton* of brand name household and cosmetic products. (CX's 349A, 354A, 397A, 413A, 467A, 478A, 1980A, 2000A.)
>
> (b) [A] $40 Gift Carton of nationally advertised household and cosmetic products. (CX 376A.)
>
> (c) [T]otal combined value of . . . at least $25. (CX 53B.)
>
> (d) [T]otal combined value of at least $30. (CX 2031B.)

191. Some CRC customers believed this representation (Alpert 2454; Engleman 2494; Berliner 2688–89; Otner 2884; Povill 2915; Jenkins 3062–63).

192. A. M. Sampling, a supplier of household and cosmetic product kits to CRC (Fs. 39, 72), determined the value of items in the kit by assigning either manufacturers' suggested retail prices, the actual prices at which the products were sold nationally or, for products smaller than regular retail size, a value calculated upon the fractional equivalent of the contents compared to the smallest regular retail size (Taubes 2270–71). If a product had both a suggested retail price and an actual selling price, then A. M. Sampling would use the suggested retail price as the value even though it might be higher than the actual selling price. A. M. Sampling made no attempt to verify that products were actually sold at the suggested retail prices which were used in making the valuations (Taubes 2257–58, 2277–78).

193. Raymond Anderson requested that the kits contain approximately $15.00 worth of merchandise, excluding the perfume (Taubes 2278–79, 2285–86, 2302). Consequently, A. M. Sampling assigned a value to each kit, excluding the perfume, of approximately $15.00 (Taubes 2278, 2310).

194. A. M. Sampling included perfume in almost all the kits supplied to CRC (Taubes 2267–68). Initially, the perfume placed in the

CRC kits was named "Beau Bien" (Taubes 2268, 2273, 2308). This was the same perfume used in the MDC Treasure Chest; it did not have the retail value claimed by CRC, but had a cost of approximately 33 cents to 40 cents (Fs. 199, 204). [47]

195. Other CRC kits contained different perfumes. A. M. Sampling placed a bottle of "Tortue" in over 25,000 CRC kits. This perfume had a retail value of $4.50 (Taubes 2272). At CRC's request, two bottles of a perfume named "Xanadu" were placed in some CRC kits in order to raise the value of those kits. "Xanadu" had a retail value of $10.00 (Taubes 2271–74). A. M. Sampling purchased less than 20,000 bottles of "Xanadu" (Taubes 2272). Thus, less than 10,000 CRC kits contained $20 worth of this perfume.

"Paris Now" was another perfume that was placed in about 20,000 of CRC's kits. There was no retail value assigned to "Paris Now" because it was manufactured specifically for A. M. Sampling (Taubes 2275–76). This perfume had been in limited retail distribution in certain parts of the country and had had limited sales at the full $25 retail price assigned (Taubes 2282–85).

196. Inclusion of the "Beau Bien" perfume or the "Tortue" perfume in the CRC kits did not add significantly to the value of the CRC kits. Inclusion of one bottle of "Xanadu," two bottles of "Xanadu" or one bottle of "Paris Now" could increase the value of the CRC kits by $10.00, $20.00 or $25.00, respectively (F. 195).

197. Therefore, CRC artifically inflated the value of some of the Gift Cartons and Super Jackpot Packages. The value of some of the kits was significantly less than $25.00, although some of the kits may have had values of $25.00 to $40.00 depending on the perfume contained inside (CRC Sanctions, pp. 3–4).

V. Retail Price of Perfume

198. MDC has represented that its Treasure Chest contained "a rare and very expensive cosmetic" with a retail value of $20.00 (Complaint ¶ ¶ 6(26), 7(26); CX's 111A, 288A, 1367A, 1701A, 1706B, 1711A, 1716A, 1721A).

199. The "rare and very expensive cosmetic" contained in MDC's Treasure Chest was a perfume named "Beau Bien." This perfume was manufactured and sold by Grafton Products, Inc. (F. 15), at a cost to MDC of approximately 33 to 40 cents per one-half ounce bottle (CX's 1011, 1915, 1917, 1918, 1922). Grafton was the sole supplier of perfume for MDC's Treasure Chests (Fs. 15, 188). [48]

200. Grafton's president, Edward Marcus (Marcus 3216), testified that "Beau Bien" was not a specific perfume, but was just a name Grafton gave to various fragrances customers wished to purchase

(Marcus 3230, 3254–56, 3264–67). Marcus also testified that, "You can charge whatever the going rate is, whatever you can get" for a perfume (Marcus 3259).

201. Neither Grafton nor its advertising subsidiary, Beth Wendy Products, Inc. (Marcus 3242–43), had retail sales, but rather dealt only in manufacturing and in wholesale sales (Marcus 3244–45). Its "Beau Bien" perfume was an item used from time to time as a "door-opener" or give-away (Marcus 3230).

202. A *Harper's Bazaar* advertisement for "Beau Bien" was placed by Grafton (through its advertising subsidiary, Beth Wendy Products) at MDC's request (Marcus 3242–43; CX's 1920, 266). Grafton billed MDC for the *Harper's Bazaar* advertisement (CX's 1923, 1924). MDC reimbursed Grafton for the advertisement after Grafton paid the magazine by company check (Marcus 3260–61, 3268). The advertisement did not produce any business for Beth Wendy Products (Marcus 3243).

203. MDC also requested that Grafton provide a label on the "Beau Bien" bottle to say, "Nationally Advertised in Harper's Bazaar, $20.00" (Marcus 3232–33). Grafton billed MDC for 53,500 of these labels (CX 1916; Marcus 3241, 3231–32).

204. Thus, the "Beau Bien" perfume was not placed on the retail market for general distribution and had no actual retail value. The only basis for representing its retail price as $20.00 was the advertisement in *Harper's Bazaar*. The only basis in the record evidence for the value of "Beau Bien" is its cost of 33 to 40 cents.

W. Product Size

1. *Market Development Corporation*

205. In its consumer solicitations, MDC has represented that the products contained in the Treasure Chest were full-sized products (Complaint ¶ ¶ 6(25), 7(25)). MDC made this representation through use of the following statements contained in some of its solicitations:

(a) They are not sample sizes, but full sizes. (CX's 1337A, 1726A.)

(b) ALL TWELVE IN FULL SIZES. (CX 1706D.)

(c) Not off-brand samples, these are full-size well known products. (CX 1729A.) [49]

206. The record evidence supports the finding that MDC's Treasure Chests did not always contain full-sized products; rather, some sample-sized products were also included (Karniol 2031–32; Taubes 2247, 2301–02). A "sample size" product is one specifically made by manufacturers

for sampling, and is usually smaller than normal retail size (Taubes 2236, 2301).

2. *Columbia Research Corporation*

207. In its consumer solicitations, CRC has represented that the products in the Gift Cartons were full-sized products (Complaint ¶ ¶ 6(25), 7(25)). CRC made this representation by stating in some of its solicitations, "[T]hey're all full-size products." (*e.g.*, CX's 349A, 354A, 376A, 397A, 413A, 467A, 478A, 499A, 1980A, 2000A).

208. Some CRC customers believed this representation (Berliner 2688–89; Otner 2884).

209. Approximately 10% of the items included in the CRC kits were sample-sized (Taubes 2276–77). For instance, of the 16 products contained in one Gift Carton, a 0.4 oz. packet of Vitabath was marked "Trial size—not for resale," a Gillette Trac II razor carton was marked "Trial Razor Enclosed" and a can of WD–40 was marked "Sample not for resale" (CPX 5E, M, P).

210. Thus, the record evidence supports the finding that CRC's Gift Carton did not always contain full-sized products, but contained some sample-sized products (Taubes 2276–77; CRC Sanctions, pp. 3–4; Stipulation, p. 3, n. 6; Third CRC Admissions, Request 53).

X. Total Value of Offers

1. *Market Development Corporation*

211. MDC has represented that the total value of its Treasure Chest offer was $250 to $300, or represented a savings of over $200 (Complaint ¶ ¶ 6(24), 7(24)). MDC made this representation through use of the following statements contained in some of its solicitations:

> (a) [T]he total intrinsic value of your winnings amounts to approximately $250.00. (CX's 111B, 288B, 1716B, 1721B.) **[50]**
>
> (b) [T]he total intrinsic value of your winnings amounts to approximately $300.00. (CX's 1367B, 1701B.)
>
> (c) [A]ny customer who takes advantage of all of these offers will have a savings of over $200.00. (CX 1706B.)

212. An examination of the individual parts of MDC's Treasure Chest offers reveals that the total value was not as represented. The $20 retail price for the perfume and the $30 or more value for the Treasure Chest were overstated values (Fs. 189, 204). The food and entertainment vacation coupons given to MDC's customers had various

"strings" attached such as requiring significant out-of-pocket expenditures or extensive traveling for consumers to realize the full value of the coupons (F. 162). Thus, the value of the coupons was overstated. MDC misled consumers into believing that they were to receive a free vacation, whereas they had to pay their own transportation costs, additional charges in some instances for peak season accommodations and a $15.00 initial fee (Fs. 116, 117). Consumers not only did not receive a free vacation (F. 119), but the costs attached detract from the total value of MDC's offer.

213. Thus, the record evidence supports the finding that the values of the goods and services offered by MDC were significantly less than the $250 to $300 values ascribed to them in MDC's Treasure Chest solicitations. If any "savings" were realized by dealing with MDC, those savings were significantly less than the $200 or more in savings claimed by MDC's offer.

2. *Columbia Research Corporation*

214. CRC has represented that the value of the total Jackpot package was $500 or more (Complaint ¶ ¶ 6(24), 7(24)). CRC has made this representation through use of the following statements contained in some of its solicitations:

> (a) You are going to get well over $500 in benefits for your *Las Vegas Vacation For Two*. (*E.g.*, CX's 32C, 39A, 43A, 283E, 712A.)
>
> (b) *[T]he more than $500 benefit Package Paid-in-full!* (*E.g.*, CX's 32D, 39B, 283F, 712B.)
>
> (c) [O]ver $500 in Las Vegas benefits. (*E.g.*, CX's 32E, 39C, 283G, 712C.) [51]
>
> (d) [T]he Grand Total of this Las Vegas Jackpot amounts to approximately $500 or more. (CX 53B.)
>
> (e) [O]ver $1400 in benefits. (CX 229A, B.)
>
> (f) LAS VEGAS TOTAL OVER $600. THERES MORE. . . . (CX 272A.)
>
> (g) *[W]ell over $500 in vacation benefits.* (*E.g.*, CX's 346A, 376A, 467A, 595A.)

215. Some consumers felt that they would get some of their benefits in cash (Gorman 180–81; Williamson 109–10; Blackmore 686–87; Bratschi 629). Others thought that their benefits could be realized at any casino (Cain 865), or that they would get the benefits all at once (Gorman 199). Some consumers felt that all or most meals were included (*e.g.*, Williamson 113; Blackmore 686–87; Bratschi 629; Borstein 1314; Andrews 784; Bryan 1129–30; Wiersma 1214–15).

216. CRC's customers were required to spend significant amounts

of their own money to purchase food and drink, contrary to the representations made in the solicitations. The CRC coupon program included a two-meals-for-the-price-of-one program, requiring the customer to purchase one meal out-of-pocket in order to obtain the free meal. Moreover, the coupons were for places of business geographically distant from one another, thus making it more difficult for the consumer to realize the full value (Jenni 1929–30; Joseph Anderson 4077; *e.g.*, CX's 708, 1479; Fs. 128, 165).

217. CRC failed to disclose in its initial solicitations the existence of conditions or restrictions which were attached to the use of the gaming packages that CRC customers received. These conditions and restrictions were often quite lengthy, complicated and confusing to consumers. For example:

> (a) 1. Upon your arrival, present YOUR GAMING INVITATION VOUCHER and your ID to the Sundance West redemption booth. You must be 21 years of age and a non-resident of Nevada.
>
> 2. Your registration card MUST BE FILLED OUT COMPLETELY! The registration card along with a refundable deposit of $1.00 must be given back to the cashier. (The $1.00 deposit is to cover the cost of handling and registering your casino invitation and will be refunded to you as part of your casino package after invitation is registered by casino cashier.) [52]
>
> 3. A minimum time interval of one hour and a maximum of 1 1/2 hours is required between redeeming each part. Coupons become valid hourly, starting at time indicated below, then in daily sequence. Coupons must be utilized as stipulated in paragraph 3 or they become void.
>
> 4. Daily unredeemed portion is void six hours after you start your "Sundance West Casino Package."
>
> 5. Only 1 day of "Sundance West Casino Package" tickets may be used by 1 person in any one day. Only 1 invitation may be used during any 30 day period by 1 person.
>
> 6. The Lucky Bucks are match play to be used on Big 6 Wheel, and 21 tables and pay 2 to 1 on your money. Limited to 1 per person. (Bet $1.00 Win $2.00).
>
> 7. The drinks are in addition to the free drinks served while playing (*E.g.*, CX 225E.)
>
> (b) 1. Upon your arrival, present this invitation and your I.D. to our Casino Cashier.
>
> 2. You must be 21 years of age and a non-resident of Nevada.
>
> 3. A minimum time interval of one hour is required between redeeming each part.
>
> 4. Unredeemed portion is void eight hours after you start your FREE FUN SPREE.
>
> 5. Only one day of FREE FUN SPREE tickets may be used by one person in any one day.

> 6. The Lucky Bucks are match play on 21 table and pay 2 to 1 on your money. Or may be exchanged for two super slot tokens.
>
> 7. The drinks are of your choice (hard or soft) and are in addition to the free drinks served while playing.
>
> 8. Your food may be choice of Menu. Customer pays for highest-priced meal ordered, second meal is free. [53]
>
> 9. One invitation per person, adults only. Coupons all or in part are subject to revision at the discretion of management without prior notice. Coupons are non-refundable and non-transferrable in any amount.
>
> 10. Coupons become valid in sequence. One complete set (1-2-3) must be validated each day in order to proceed to the following day (*E.g.*, CX 1479, 1480.)

Few of the original offers mention any limitations and the one mention of "match play" is buried in the middle of a four page solicitation (CX's 32E, 224A, 278A, 1389C). The solicitations, read as a whole, emphasize the cash and the free benefits that the customer is informed will be forthcoming.

218. The gaming package was usable only at specified casinos and was not transferrable among casinos. Each package was tailored for a particular casino, with differing restrictions on the use of Lucky Bucks and super slot tokens (Joseph Anderson 4074; Kegley 4778–79; Boyd 1833–34; Jenni 1892–94; *e.g.*, CX's 708, 709, 711A, B).

219. The different casino packages offered various dollar amounts of "Lucky Bucks." "Lucky Bucks" are certificates used only in match play; they are issued by a particular hotel or casino and can only be used at that hotel or casino. In order to use the "Lucky Bucks," the consumer must match the "Lucky Buck" with his own dollar in placing a bet, *e.g.*, for a minimum two-dollar bet, only the casino's "Lucky Buck" and the customer's dollar bill could constitute the two dollars of the bet (Boyd 1832–34; Jenni 1892–93, 1959; Fs. 217(a)(6), 217(b)(6); *e.g.*, CX's 1899–1906). In the King 8 Hotel and Casino's program, "Lucky Bucks" could only be used for specified games and at designated tables (*e.g.*, CX's 708, 709A, 711A–B, 1479, 1480). Similarly, at the California Hotel and Casino, the CRC customer must match the cost of the keno ticket with his or her own money in order to use the coupon for a keno bet (Boyd 1872–73; CX's 1899–1901, 1903–06).

220. Consumers had to pay close attention to intricate instructions on how to redeem the coupons in the gaming packages. The benefits were redeemable only at certain specified stages or times; the gaming and other benefit coupons often would have to be turned in and time-stamped at hourly intervals over a [54]three-day period (Joseph Anderson 4074; Boyd 1807–09; Kegley 4743–44, 4770–73, 4778, 4837–38; F. 217; CX's 708, 711A–B, 1479, 1480, 1899, 1900; RX's 21, 22).

In order to receive the benefits of the California Hotel and Casino program, for instance, CRC customers had to redeem the gaming coupons in sequence at minimum time intervals of one hour over a three-day period (Boyd 1807–09; CX's 1899–1900). Each set of coupons had to be redeemed within eight hours from the time the customer began using the set (CX's 1899–1900). The program was similar at the King 8 Hotel and Casino for CRC customers, except each of the three days' sets of coupons expired at midnight of the date issued (Jenni 1906–09; CX's 708, 711A–B, 1749). Similar programs were common at other casinos used by CRC (Lawley 469–71; Blackmore 696; Bratschi 646–47; Bryan 1149–50; Riesenfeld 1624; Borstein 1324–28; Stipulation, p. 6).

221. Another factor that reduced the value of the gaming package was that CRC's customers had to use their own money in order to receive many benefits of the gaming coupons such as "Lucky Bucks" (F. 217; Lawley 469–70; Blackmore 700; Bryan 1146–49; Riesenfeld 1624). For instance, for every $6.00 in nickels that a CRC customer received, the customer had to pay $5.00 of his or her own money (Joseph Anderson 4075–76; CX's 708, 711A–B).

222. The intricate redemption features of the coupons in CRC's gaming packages led to consumer misunderstanding and consumer complaints. One witness, Billy Dale Kegley, who is familiar with and designs promotional gaming packages such as have been used by CRC (Kegley 4743–44, 4777–78), explained that casino personnel often misunderstood and incorrectly explained how the gaming package program worked, resulting in consumer complaints which were based upon the consumer's misunderstanding as to how the program should be utilized (Kegley 4756).

For instance, the California Hotel and Casino received complaints during the time in which it operated the gaming program in conjunction with CRC, September 24, 1975 to February 24, 1976, from customers who did not understand the mechanics of the gaming certificate redemption program and who expected to receive the stated value of the certificate in cash immediately (Boyd 1812, 1815–17).

223. Many consumer witnesses testified as to their dissatisfaction with the manner in which the gaming package worked (Holmes 512–15; Lawley 468–72; Blackmore 699–704; Bratschi 648, 658; Dworak 929–31; Bryan 1149–54; Heller 1577–79; Riesenfeld 1624–26; Borstein 1325–28). One consumer witness expressed his dissatisfaction as follows: [55]

> Q. Did you attempt to use any of the gaming benefits?
>
> A. Yes, I tried but there was a certain procedure you have to go through which

> resulted really in my being a captive of the cassino [sic] if I wanted to take advantage of those benefits.

(Borstein 1325.)

224. Similar gambling certificates or gaming packages were available to the general public for free and could be obtained at various places in and around Las Vegas (Joseph Anderson 4073–74; Blackmore 717–20; Heller 1577–78; CPX 2B, D, F, H, J, N, P). Furthermore, the solicitations stated that free drinks were part of the gaming package value; however, Las Vegas casinos make a common practice of giving out free drinks to people who are gambling (Jenni 1959–60; Joseph Anderson 4076; Kegley 4856).

225. The CRC gaming package had limited or no value in certain other situations. Prior to late 1975, the King 8 Hotel and Casino was not approved for live gambling. Gambling was machine-operated, such as slot machines (Jenni 1895; Gross 345–46). On other occasions, CRC represented that it could give customers only up to one half of the promised gaming benefits at one time because of Nevada gaming regulations and that a second equal amount of Gaming Packages would be provided upon request for "use on a return trip to Las Vegas anytime during the coming year." (CX 1839). CRC's own defense witness, Billy Dale Kegley, who claimed to be knowledgeable about Las Vegas gambling matters, stated that no such regulation existed. (Kegley 4844). Finally, the California Hotel and Casino notified CRC, by letter dated February 25, 1976, that it would not honor any gaming certificates after February 29, 1976 (CX 1655; Boyd 1826–27). Raymond Anderson, in his capacity as president of CRC, responded by stating that he intended to continue distributing the certificates (CX 1656A–B). CRC customers who presented their certificates to the California Hotel and Casino after February 29, 1976 did not have their certificates honored (Boyd 1830).

226. Thus, the record evidence supports the finding that the values of the goods and services offered by CRC were significantly less than the $500 or more claimed for them in CRC's solicitations. CRC significantly overstated the worth of the goods and services it offered (CRC Sanctions, pp. 3–4). [56]

Y. Connection to Other Sales Promotions

1. *Market Development Corporation*

227. In its Treasure Chest solicitations sent to prospective customers, MDC has implicitly represented that its offers were not connected to the sales promotion of any other products or services (Complaint ¶¶

6(15), 7(15)). MDC made this representation by virtue of its failure to disclose that its offers were sometimes connected to the sales promotion of other products or services (*see e.g.*, CX's 111A–B, 288A–B, 1337A–B, 1367A–D, 1701A–B, 1711A–B, 1716A–B, 1721A–B, 1729A–B). None of MDC's solicitations makes mention of any additional promotions.

228. In fact, in many instances, customers who purchased the Treasure Chest would subsequently be solicited to purchase a sewing machine (Flach 3569–72; Sarbaugh 3637–39).

229. Furthermore, the vacation certificates which MDC provided to its customers were sometimes connected with various land sales programs in Florida and/or Las Vegas (CX's 664, 679, 680, 689, 691, 867, 875). Raymond Anderson intentionally designed MDC's solicitations so as not to disclose any land sales connections. (CX 688B). Some MDC customers later complained about the high-pressure sales tactics used in these land sales presentations (*e.g.*, CX's 1550B–C, 1551A–B).

2. *Columbia Research Corporation*

230. In its Super Jackpot Package and Gift Carton solicitations sent to prospective customers, CRC also has represented that its offers were not connected to the sales promotion of any other products or services (Complaint ¶ ¶ 6(15), 7(15)). CRC implicitly made this representation by virtue of its failure to disclose that its offers were connected to the sales promotion of other products (*see, e.g.*, CX's 32C–F, 39A–D, 53A–D, 93A–D, E–H, 124A–C, 125, 151A–D, 272A–D, 283E–H, 335A–D, 346A–D, 376A–D, 397A–D, 467A–D, 503A–D, 712A–D, 1677A–D, 1908A–D, 2003A–D). CRC also made this representation explicitly through use of the following statement contained in some of its solicitations:

> Maybe you think there's some kind of "catch" to it . . . that you'll have to pay some hidden charges or attend a land sales presentation or something like that.
>
> Well, let me assure you nothing could be further from the truth. We wouldn't be in business if there was any "catch" to our offer. (CX's 32B, 148, 348, 468, 1803, 1871.) [57]

None of CRC's solicitations makes mention of any additional promotions.

231. Two CRC customers who went to Florida testified that they were subjected to a high-pressure time-sharing sales presentation (Wilson 3163–67; Engleman 2509–12, 2514).

232. In fact, the record evidence supports the finding that the vacation certificates which CRC provided to many of its customers were connected to the sales promotions of various condominium or

time-sharing programs in Florida, Las Vegas and Puerto Rico (Joseph Anderson 4065–71; Kegley, 4810–11; Fs. 37, 38; McGuire 2363–66, 2376–78; Wray 5236–37, 5241–42; CX's 1063, 1083, 1089A–C; CRC Sanctions, pp. 3–4; Stipulation, pp. 6–7; Third CRC Admissions, Request 11).

Z. Delivery Costs

233. MDC has represented that it would bear the cost of delivery of its products (Complaint ¶ ¶ 6(28), 7(28)). MDC implicitly made this representation with regard to its sewing machine offers by stating in its solicitations that the sewing machines were available to consumers for a "Total Cost" of $69.50 or $79.50 (*e.g.*, CX's 65A, 1313A, 1331A, 1733A, 1738A, 1741A).

234. The MDC employees in charge of sewing machine orders and shipments, Lois Flach and Joseph Anderson, testified that the sewing machines were shipped Cash On Delivery (Flach 3518–19, 3549–52, 3554; Joseph Anderson 3970). MDC's parcel post shipping lists included a C.O.D. column which showed the price that the customer paid and the actual shipping cost to MDC (CX's 1587, 1588; Flach 3549–50, 3557). MDC's United Parcel Service reshipment lists also included the C.O.D. amount that the customer paid and the actual shipping rate that MDC paid (CX's 1589A–B, 1590, 1591; Flach 3553–54, 3557). These sets of lists were prepared by Lois Flach based on figures that she received from the shipping department (Flach 3557–58). MDC collected a C.O.D. charge from its customers which was substantially higher than the actual shipping charges paid by MDC (CX's 1587–91). Moreover, customers had to pay the shipping charges for returning sewing machines to MDC for repair (Flach 3513).

235. The delivery costs were substantial, *e.g.*, $14.95 (Land 546–48; CX's 72, 73). Disclosures regarding shipping costs were nonexistent or else confusing. CX's 65B, 1331B and 1353D list three types of payment plans. CX 65B states "freight collect" for only one of the three plans while CX's 1331B and 1353D state "freight collect" for two out of the three plans. The import of "freight collect" is unclear in light of the "Total Cost" statements on the front page of each solicitation (CX's 65A, 1331A, 1353A). [58]

236. Thus, the record evidence supports the finding that MDC's customers paid the delivery costs of the sewing machines shipped to them, contrary to the implied representation.

AA. Non-Delivery of Goods and Services

1. *Market Development Corporation*

237. In its consumer solicitations, MDC has implicitly represented to prospective customers that it would deliver its goods and services, including sewing machines, Treasure Chests, vacation certificates and trivets (Complaint ¶ ¶ 6(27), 7(27); F. 6). No mention is made in any offer of extended delivery time.

238. In approximately 1973, MDC began processing orders by computer because the volume of orders had grown to the point where they could not be handled manually (Flach 3515–16; Fs. 10, 11). MDC sent its sewing machine and Treasure Chest orders to its computer service, Small Business Data Processing (Sarbaugh 3630–31), on a daily basis (Juanita Anderson 3764–65). Small Business Data Processing took two days, on the average, to process these orders (Sarbaugh 3671), and returned a print-out sheet and the shipping labels to MDC. MDC employees then calculated the shipping charges, entered those charges on the labels and made up the shipping orders which were stored at Hamilton Avenue until MDC's shipping department gave instructions to send them the orders. (F. 11). Generally, MDC mailed out the shipping labels to its Treasure Chest suppliers within a day or so of receiving the labels from the computer service (Harris 5048–49).

239. During the period of time that MDC purchased its Treasure Chests from Selective Sampling, April/May 1972 to January/February 1973 (Karniol 2017–18), MDC prepared the instructions, documents and labels for shipping and forwarded these to Selective Sampling, along with a check covering the order and a computer-print-out listing the customers' names and addresses (Karniol 2021; F. 18). Selective Sampling usually shipped the Treasure Chests to consumers within three or four days, or ten days at the outside, after receiving the labels from MDC (Karniol 2023–24; F. 18). The percentage of packages returned as "undeliverable" was under one percent (Karniol 2121–23).

240. During the period of time that MDC purchased its Treasure Chests from Value Package, 1973 to 1974 (Taubes 2242), Value Package shipped the Treasure Chests directly to MDC in [59]Cincinnati for reshipment to consumers (F. 18). Value Package shipped Treasure Chests to MDC within two to three weeks after receiving the orders (Taubes 2262–63).

241. MDC developed a backlog of 10,000 to 15,000 Treasure Chest orders by June 1974, the time it went into bankruptcy. During this time, MDC was still processing 1,000 to 2,000 Treasure Chest orders a week (Harris 5058; Flach 3542–46; Joseph Anderson 4000).

242. MDC printed cartoon form letters advising customers of a delay in shipment (CX 468); such letters were sent to Treasure Chest

customers, with a similar letter sent to sewing machine customers (Joseph Anderson 4000–04; Flach 3582). MDC's computer service also printed 19,158 letters to MDC customers concerning late shipments (CX's 1556, 1557). One of the delay-in-shipment letters sent by MDC to a customer stated, in part, as follows:

> Your Treasure Chest is now being packed. The delay resulted because a few products were late arriving from the manufacturers, and naturally we wanted to include the products in your package. (CX 114.)

However, MDC did not pack its own Treasure Chests; they were packed and shipped by the suppliers (Fs. 14, 15, 16).

243. Any delay in the shipment of Treasure Chests or any failure to ship the Treasure Chests was due to MDC's failure to provide the shipping labels and payments for the shipments to its suppliers (Karniol 2065–67, 2127–28; Marcus 3235–36). In one instance, MDC's Treasure Chest supplier held up shipments to certain MDC customers for as much as 60 days because of MDC's failure to make payment (Karniol 2127–28; CX's 1572, 1573A–B, 1574). MDC did not ask its supplier to advise the listed customers of a delay (Karniol 2128–29).

244. Two MDC customers testified in this proceeding that they had sent in their money in response to the solicitation, but never received the Treasure Chest ordered (Dudley 1541; Pill 605).

245. In 1970, MDC was able to ship sewing machines to its customers within a week to ten days after the orders were received (Flach 3511, 3514). [60]

246. MDC was receiving 40 to 50 sewing machine orders per day in 1973; thus, MDC received about 11,400 to 13,000 orders in 1973 (F. 10). However, MDC purchased only 6,048 sewing machines in 1973 from its suppliers, G.C.I. and Riccar (CX's 896A, 923A, B). This resulted in an excess of about 5,000 to 7,000 sewing machine orders for which MDC did not purchase sewing machines in 1973. There is nothing in the record to show that the rate of incoming orders decreased until the mail stop in June 1974 (F. 248). Nevertheless, MDC purchased only 1,442 sewing machines during 1974 (CX's 896B, 923A). Thus, it is probable that there was a further increase in the number of orders that could not be filled because of MDC's failure to order a sufficient quantity of sewing machines.

247. Therefore, there was also a backlog of sewing machine shipments by MDC. By the summer of 1973, it took at least a month to six weeks to ship the sewing machines after the orders were received (Flach 3535–36). By January/February 1974, MDC took three to four months to ship the sewing machines after the orders were received from the customers, with no more than five or six sewing machines

being shipped each week. All of those shipments were in response to Better Business Bureau and state Attorneys General complaints (Flach 3536–37, 3540). The backlog as of January/February 1974 consisted of 8,000 to 10,000 sewing machine orders waiting for shipment (Flach 3541–42; Joseph Anderson 3598–99).

248. Despite the substantial backlog which was still growing, MDC employees did not receive instructions to stop processing incoming orders at anytime in 1974 (Juanita Anderson 3787–88; Flach 3607–08). The processing of incoming orders did not cease until MDC's mail was stopped just prior to its bankruptcy (Flach 3607–08).

249. MDC initially responded to customer correspondence inquiring about delays in the shipment of sewing machines by sending the customer's letter back with either a response written on it or a form marginal note enclosed (Flach 3511–12, 3522). By the end of 1973, the volume of sewing machine correspondence had increased to such an extent that MDC did not respond to all of it; according to one MDC employee, Lois Flach, about one quarter of the sewing machine mail did not receive a response but, rather was "[thrown] in the garbage" after it had been opened and read (Flach 3519–20, 3524–27). Thus, although MDC sent out several thousand delay-in-shipment letters (CX 68) to sewing machine customers over a six to eight month period (Flach 3582), some customers did not receive any explanation or response at all from MDC. **[61]**

250. One of MDC's customers testified that she had ordered a sewing machine from MDC in October 1973, but did not get delivery of the machine until late February 1974, and then only after numerous letters of complaint to MDC (Land 538, 541–48, 552–54, 559; CX's 66–73, 76, 79).

251. In some of its solicitations, MDC represented that purchasers would receive tickets to Disney World (CX's 111A, 288A, 1729A). In many instances, consumers who paid for the Florida vacations did not receive the Disney World tickets promised to them (CX's 1540–47, 1648). On one occasion, one of MDC's Florida agents wrote to MDC, stating:

> We are receiving from two to three of your customers a week that are insisting on their Disney World Tickets. Our Hostesses are pacifying most of your customers that ask for tickets without promising anything but when the customer gets indignant and insists on the tickets, they must receive something. (CX 1648.)

MDC responded by sending 50 Disney World tickets to its Florida agent with directions that they be "distributed with discretion" (CX 1649).

252. At the time of its bankruptcy, MDC listed itself as having

90,000 to 93,000 unsecured creditors with claims of between $15.00 and $80.00 (F. 313).

253. Thus, the record evidence supports the finding that MDC failed, in many instances, to deliver ordered goods and services.

2. *Columbia Research Corporation*

254. In its consumer solicitations, CRC has implicitly represented to prospective customers that it would deliver its goods and services, including Gift Cartons, vacation certificates, blackjack books and buying club memberships (Complaint ¶ ¶ 6(27), 7(27); F. 21). No mention is made in any offer of extended delivery time.

255. CRC, in the regular course of business, opened and forwarded incoming orders to its computer service, Universal Data Systems, Inc., the same day (Jacobson 4947–48; F. 23). Universal processes those incoming orders, and printed vacation certificates and shipping labels in the regular course of business (F. 24). Universal Data Systems also printed reservation confirmations, normally three times per week (RX 62–231, 253). [62]

256. After reservation requests for accommodations in Las Vegas had been received, CRC would usually send confirmations out that same day or the next day (Joseph Anderson 4028).

257. However, CRC did not always provide vacation accommodations to its customers at the time and/or place of their choosing despite representations to the contrary. (Fs. 145–60). For instance, Thursday, Friday, Saturday and holiday arrival dates have always been unavailable to CRC customers (F. 147). Moreover, CRC and Genie Vacations could only handle an average of 50 to 60 Las Vegas check-ins per day (Joseph Anderson 4055).

258. Thus, CRC and Genie Vacations could accommodate an average of approximately 10,000 to 12,000 Las Vegas check-ins per year through CRC's program. (F. 257). However, according to the testimony of Richard Morelli (CPF, Appendix A), CRC received money from customers who indicated that they wanted to take their vacations in Las Vegas in at least the following numbers:

1975–1976	10,944 customers
1977	110,329 customers

Since the Las Vegas vacation certificates were good for one year (*e.g.*, CX's 39B, 101B, 304B, 1869B), the customers who purchased vacations in 1975 to 1977 would have to be accommodated in 1975 to 1978. Thus, CRC promised Las Vegas accommodations to 221, 273 customers, but had the capability of accommodating only approximately 40,000 to 48,000 customers.

259. CRC also engaged in numerous practices which had the effect of discouraging consumers from using the vacation certificates provided to them pursuant to CRC's offer or encouraging and, at times, forcing consumers to make changes in their vacations that were not described in the initial solicitation (Fs. 147–50, 152, 154, 160, 216–21, 225, 260–63, 265–67).

260. One CRC customer testified that CRC and its agents provided her with confirmations for reservations that were mailed after the date of the reservation. (Torres 1386–87; CX's 164, 165).

261. On occasion, CRC provided meal, gambling and other benefits to customers that were different than what was offered in the original solicitation (*e.g.*, Cain 874). **[63]**

262. One customer testified that CRC informed her that "they lost my reservation in the mail" (Breece 1196–97; CX 197A–B).

263. Respondent's witness Kegley, the supplier of the two-nights-for-the-price-of-one complimentary accommodations directory, testified that he recommended to Raymond Anderson and CRC that the two-for-one accommodations directory be used as a "conversion" from CRC's existing vacation certificate program (Kegley 4815–17). CRC did, in fact, substitute the two-for-one accommodations directory for the reservations requested pursuant to the vacation plan originally offered in the case of at least one customer (Brady 237–38; CX 229A–B). In other instances, CRC provided customers with the directory along with other materials in an attempt to persuade them to substitute a different vacation plan from that originally offered (Williamson 154–55; CX 1394; Lawley 450; Horton 1080, 1115–16; CX 1782; Torres 1372; CX 1831; Benun 1423; CX 221A–B; Holtzman 2646; CX's 487A–B, 508). CRC also solicited customers to switch vacation plans and make use of the two-for-one directory (Brady 257; Cain 875).

264. As part of some of the offers contained in its consumer solicitations, CRC represented that purchasers would receive a discount buying club membership (*e.g.*, CX's 335A, 595A). CRC failed to deliver the buying club membership to some of those customers who had ordered it (Holtzman 2651; Macario 3038; Huber 3092; Berger 4261).

265. As part of some of the offers contained in its consumer solicitations, CRC represented that purchasers would receive tickets to shows in Las Vegas (Holmes 496; Dworak 906; CX 304A; Blackmore 686–87; CX 224A; Borstein 1314–15). However, CRC failed to deliver show tickets to some of those customers who had paid for the Las

Vegas vacation (Blackmore 687, 727; Bratschi 648; Holmes 505; Dworak 913; Borstein 1330).

266. In numerous instances, CRC delivered goods and services more than 30 days after receipt of the order from the consumer (*e.g.*, Lawley 425–26, 440–41, 443–45; Gellhorn 2824–25, 2827–30, 2834–35; Otner 2883, 2886–90; Stipulation, p. 3, n. 5).

267. CRC failed to deliver reservation request forms, which were necessary to take advantage of CRC's vacation offer, to some consumers (*e.g.*, Birch 2999–3000, 3008), and failed to provide confirmed reservations to others (Povill 2918–27, 2931–32; Alpert 2462; Berliner 2704; Macario 3038). **[64]**

268. In certain instances, CRC failed to deliver Super Jackpot Packages and Gift Cartons which had been ordered and paid for by consumers (Janov 292; Alpert 2462; Engleman 2515; Berliner 2704; Gellhorn 2873; Otner 2891; Birch 3000, 3008; Jenkins 3072; Gerstad 3299; Stipulation, p. 3, n. 5).

269. Thus, the record evidence supports the finding that CRC failed, in many instances, to deliver ordered goods and services (CRC Sanctions, pp. 3–4).

BB. Refunds and Guarantees

1. *Market Development Corporation*

270. MDC has represented in some of its consumer solicitations that its offer included an unconditional money-back guarantee (Complaint ¶ ¶ 6(29), 7(29)). MDC made this representation through use of the following statements:

> (a) We take the risk, I must repeat, your money will be promptly refunded in full. . . . YOU *MUST AGREE* THAT YOU HAVE RECEIVED *MANY TIMES* YOUR MONIES [sic] WORTH. YOU HAVE EVERYTHING TO GAIN AND ABSOLUTELY NOTHING TO LOSE. (CX's 1331B, 1337B, 1353D, 1706C, 1711B, 1716B, 1721B, 1726B, 1738D, 1741B.)
>
> (b) Naturally, if for any reason whatsoever, upon the completion of your holiday for two, you feel that you did not receive many times your original $15.00 investment, or if you feel that you did not have the vacation of a lifetime and you were not totally delighted with your accommodations, your $15.00 service charge will be *REFUNDED IN FULL . . . AND YOU STILL KEEP EVERYTHING THAT YOU RECEIVED IN YOUR TREASURE CHEST WITH OUR COMPLIMENTS.* (CX's 1337B, 1726B.)
>
> (c) Naturally, if for any reason whatsoever, upon receipt of your Sweepstakes Award Package, you find you are not totally and completely satisfied, you may return all prizes, certificates, etc. to us and we will promptly refund your $15.00. (CX's 1367B, 1701B, 1706B, 1711B, 1716B, 1721B.) **[65]**
>
> (d) If upon the completion of your vacation you feel that you are not completely

satisfied, you may keep each and every item received in your Treasure Chest. . . . We will still refund your $15.00 service charge in full . . . now how is that for a *100% MONEY-BACK GUARANTEE.* (CX's 1337B, 1726B.)

(e) Remember, you are risking nothing because your order is filled on a *100% MONEY-BACK GUARANTEE.* (CX's 1716B, 1721B.)

(f) *Remember, your satisfaction is guaranteed or we will refund your money in full.* (CX 1733B.)

271. MDC also represented in its solicitations that the sewing machine offered to consumers was guaranteed for 25 years (CX's 1331A, 1353A, C, 1730A, 1733A, 1736, 1738A, C, 1739A, C, 1741A, 1742A).

272. MDC included an order form with many of its solicitations that stated in large, boldface print, "MONEY-BACK GUARANTEE" (CX's 1707A, 1712A, 1717A, 1722A, 1728A).

273. In some cases, customers contacted United States Senators (CX's 1615–17), consumer action columnists in the press (CX's 1606–08) and Better Business Bureaus (CX's 1609–11) in their attempts to obtain refunds from MDC. Even where such steps were taken, customers' refunds were often held up because they did not present an account number (CX's 1606, 1609, 1615), although the number was unnecessary for verifying the request (Harris 5120–21; Sarbaugh 3637–40, 3671).

274. Lois Flach, an MDC employee, testified that about one quarter of the sewing machine correspondence was "[thrown] in the garbage" without being answered (F. 249). Joseph Anderson, who was in charge of shipping and had authority to make refunds (Fs. 50, 332, 336), testified that he was aware of backlogs, but did not know of any refunds for non-delivery. (Joseph Anderson 3998). Many consumers seeking refunds from MDC for non-delivery did not receive responses from MDC indicating that a refund would be forthcoming (Land 541–42, 562; CX 66; Pill 605; CX 115A–C). **[66]**

275. Thus, the record evidence supports the finding that MDC did not always promptly provide refunds to dissatisfied customers and, in many instances, failed to make refunds altogether.

2. *Columbia Research Corporation*

276. CRC has represented in some of its consumer solicitations that its offer included an unconditional money-back guarantee (Complaint ¶ ¶ 6(29), 7(29)). CRC made this representation through use of the following statements:

(a) Naturally, if for any reason whatsoever, upon the completion of your holiday for two, you feel that you did not have the vacation of a lifetime and you were not totally

> delighted with your accommodations, your $15.00 service charge will be refunded in full . . . and you still keep everything that you received in your Super Jackpot Package with our compliments. (*E.g.*, CX's 53C, 93B, 124B, 169B, 278B, 1668B, 2031B.)
>
> (b) Remember, you are risking nothing because your order is filled on a 100% money-back guarantee. (*E.g.*, CX's 53D, 93C, 124C, 196C, 278C, 1668C, 2031C.)
>
> (c) Because your goodwill is very important to us, we make you this *guarantee*. If for any reason, upon completion of your Holiday For Two, you are not delighted or did not receive all your benefits, your $15 will be promptly refunded upon request. (*E.g.*, CX's 82D, 93H, 151C, 283H, 1677C.)
>
> (d) Please remember, you're fully protected with a *guaranteed* refund of the small $15.95 charge if, after the trip, you're not satisfied in every way. Since there's no risk on your part, why not give me your okay? (*E.g.*, CX's 225, 348, 468, 479, 511, 1678B, 1979.) [67]
>
> (e) We guarantee if you're not totally satisfied, upon completion of your vacation, we'll promptly refund your $15.95 upon request—and you still get to keep your Gift Carton. We couldn't be any fairer. (*E.g.*, CX's 349C, 354C, 413C, 478C, 499C, 2000C.)

277. CRC included an order form with many of its solicitations that stated in large, boldface print, "MONEY-BACK GUARANTEE" (*e.g.*, CX's 347, 416, 417, 491, 495A, 511, 2033).

278. Two of respondent's witnesses, Wava Balko and Adele Jacobson, both of whom were employees of CRC and handled the issuance of refunds (Balko 4910–11, 4925; Jacobson 4943, 4945, 4947, 4961), testified that Raymond Anderson instructed refunds to be issued only where the customer took the vacation but was very unhappy or could not take the vacation because of a death in the family, serious illness, financial difficulties or the inability of CRC to accommodate a second choice of reservations; if the customer did not fit into one of these five categories, then the refund would be denied (Balko 4930–33, 4937–38; Jacobson 4965–68, 4989–93, 5002–03).

279. Due to the conflict between the statements contained in F. 276 (a), (c), (d) and (e), which condition the refund on the customer having first taken the trip, and the statement of a money-back guarantee on the order form (F. 277), many consumers understood there to be an unconditional guarantee rather than a guarantee conditional on taking the vacation (Brady 232; Peters 60–61; Horton 1078; Wiersma 1216; Birch 2994; Huber 3084).

280. CRC has received numerous requests for refunds from consumers who have paid money to CRC (First CRC Admissions, Requests 1d–130d, 131d–211d, 212f–262f, 263d–274d, 275d–287d, 288e–322e, 323c–370c, 371d–372d, 373d–387d, 388e–389e, 390e–391e).

281. Many customers who received solicitations containing the types of statements described in F. 276, and who requested refunds

without having first taken the vacation were not given refunds by CRC (Peters 52; Williamson 125; Gorman 198; Janov 288–92; CX's 60, 61; Gross 356; Rees 396–401, 403–406; CX's 131, 119, 121–23; Szitkar 751; Tuber 830–36; CX's 1673, 1674; Cain 873–75; Horton 1099–1101; CX 1779A–B; Breece 1197–98; CX 198A–B; Wiersma 1230–31; CX 1818; Torres 1385–91; CX's 161A–B, 162, 1841; Benun 1431–33; CX 216; Riesenfeld 1625, **[68]**1627–32; Banos 1671–72, 1677; Alpert 2460–62; CX 1951; Cesario 2592; CX's 372A–B, 373A–B, 374A–B; Holtzman 2644–45, 2650–51; CX's 488, 481; Povill 2925–27, 2930; CX's 608, 609A–D; Birch 2999–3000; CX 350; Macario 3038; CX 594; Jenkins 3072; CX's 540–41; Huber 3087–89, 3092; CX's 513, 514A–B; Berger 4255–59, 4261). Many of these customers were unable to make use of the vacation package because of the actions taken by CRC or its agents, as described in Fs. 147–50, 152, 258, 260, 262, 267.

282. Even some of those customers who satisfied CRC's stated refund policy by having first taken the trip were not given refunds following their requests to CRC (Lawley 472–75; CX 1771; Holmes 514–15; CX 813; Blackmore 701–04; Bryan 1152–55; Engleman 2512–15).

283. Thus, the record evidence supports the finding that CRC did not always promptly provide refunds to dissatisfied customers and, in many instances, failed to make refunds altogether (*see also* CRC Sanctions, pp. 3–4).

CC. Reasonable Basis

284. In their consumer solicitations, MDC and CRC have represented, directly or by implication, that they had a reasonable basis for making the representations challenged in this proceeding prior to making them (Complaint ¶ ¶ 6(30), 7(30); *see, e.g.*, CX's 32C–F, 39, 101A–C, 111A–B, 124, 169, 224, 272, 283E–H, 288A–B, 335, 346, 478, 503, 525, 1677, 1842, 1868, 1869, 1908, 2003, or any other solicitation in the record). In addition, CRC's solicitations were often accompanied by a flyer (*e.g.*, CX's 32B, 492), which stated: "We wouldn't be in business if there was any 'catch' to our offer. We have had to *prove we deliver at least what we promise* to various States and U.S. Government agents." (CX 492).

Several examples of the ways in which MDC and CRC demonstrated their lack of reasonable bases for the challenged representations at the time of making them follow.

285. Both MDC and CRC were aware or should have been aware of the methods used by the suppliers of the Treasure Chests and Gift Cartons to assign values to the products in the kits, and that those assigned values had not been verified (Fs. 186, 187, 192, 193). **[69]**

286. MDC knew that the Hacienda Hotel and Casino was not providing lodging to MDC customers (F. 143).

287. CRC knew that the California Hotel and Casino was not providing lodging to CRC customers, and that CRC did not have any arrangements with the Hacienda, contractual or otherwise (Third CRC Admissions, Request 1).

288. CRC admitted that it could not cite any gaming regulation which prohibited it from issuing more benefits than what it provided the customer (F. 225; Third CRC Admissions, Request 35).

289. With regard to their representations of co-sponsorship and representation of other companies, MDC and CRC did not have contractual relationships with the manufacturers of the products in the Treasure Chests, Gift Cartons and Super Jackpot Packages (Fs. 86, 90; Third CRC Admissions, Requests 47–48).

290. MDC represented a retail price for the "Beau Bien" perfume placed in the Treasure Chest despite the fact that neither MDC nor the actual manufacturer of the perfume ever sold the perfume at the retail level (Fs. 198, 199, 204).

291. MDC did not attempt to verify the representations of value that were made for the vacation coupons offered to consumers in MDC's solicitations (Juanita Anderson 3829–30).

292. CRC knew or should have known that, at the time it sent many potential customers its solicitations stating a total of $15.00 or $15.95, the customers would have to pay at least $5.00 per person per night extra for lodging (Third CRC Admissions, Request 49; CX 307; F. 126).

293. CRC knew or should have known that it could physically accomodate only a fraction of the consumers who requested and paid for Las Vegas accommodations (Fs. 257, 258).

294. The examples set forth above are sufficient to support the finding that both MDC and CRC knew or should have known that the challenged representations were untrue prior to making them or, alternatively, did not have a reasonable basis for making the representations prior to making them (*see also* CRC Sanctions, pp. 3–4). [70]

III. ROLES OF INDIVIDUAL RESPONDENTS

A. Raymond Anderson

1. *Market Development Corporation*

295. Raymond Anderson was president and a director of MDC, and participated in the operation of MDC in those respects (F. 45).

296. MDC was conceived by Raymond Anderson and was actually started by him (Juanita Anderson 3714–15). He determined where the

location of the company would be (Juanita Anderson 3716). He also determined that MDC would sell sewing machines, Treasure Chests and vacation certificates (Juanita Anderson 3717–18).

297. MDC was organized and operated as a family-held corporation, focused around Raymond Anderson and his family. Raymond Anderson's mother, Alberta Saal, was the treasurer and a principal shareholder of MDC (CX 660G; Juanita Anderson 3760–61). Raymond Anderson owned the residence which was listed both as her address and as the address of MDC's vice president, Wernie Hilsman (CX's 660G, 670A–B). MDC's employees included the following individuals: Raymond Anderson; his ex-wife, Juanita Anderson; Raymond and Juanita Anderson's two sons, Joseph and Daniel Anderson; his two stepsons, Rick and Steve Morgan; Raymond and Juanita Anderson's daughter-in-law, Pat Anderson; and his two nephews, Darrell and Joe Huff (CX's 672, 673A–B; Juanita Anderson 3707, 3720–22).

298. At various times, Raymond Anderson, Joseph Anderson, Juanita Anderson and Alberta Saal extended loans to MDC (CX 660I, K; Juanita Anderson 3844–45). Raymond Anderson and Joseph Anderson made a loan to MDC in the amount of $77,419.97 (CX's 660K, 671K). Alberta Saal's loan to MDC was $6,000 (CX 660I). Raymond Anderson also personally guaranteed loans that MDC received in the amounts of $12,900 and $47,488.98 (CX's 699, 700, 671G, 660M).

299. Raymond Anderson engaged in many of MDC's day-to-day activities, including:

(a) hiring employees (Juanita Anderson 3724; Joseph Anderson 3939);

(b) providing instructions to all MDC employees (Juanita Anderson 3733; CX 2110, pp. 69–70; Joseph Anderson 3952–55, 3968–69); [71]

(c) receiving reports from his employees (Juanita Anderson 3728–31; Joseph Anderson 3954–55; Harris 5135–36);

(d) dictating almost all of the non-consumer correspondence generated by MDC (Juanita Anderson 3798–3802, 3806–07; *e.g.*, CX's 848, 850, 1541);

(e) determining which companies MDC would do business with (Harris 5122);

(f) handling the correspondence from those companies that provided goods and services to MDC (Juanita Anderson 3740); and

(g) signing company checks (Karniol 2024; Juanita Anderson 3754–55).

Juanita Anderson testified that "Mr. [Raymond] Anderson was in charge of most of the things in the office. . . . He was the boss." (Juanita Anderson 3781). She also testified that "[Raymond Anderson] was the deciding person" with regard to all the details involving MDC (Juanita Anderson 3783).

Erlene Harris testified about Raymond Anderson's role at MDC as follows:

> Q. Mrs. Harris, would you tell Judge Howder what your understanding of the role of Raymond Anderson in the office was?
>
> A. He ran the whole business. If he composed his letters, he made up his mailings. He ran the business. (Harris 5121.)

300. Raymond Anderson was responsible for the preparation and content of MDC's consumer solicitations, including deciding upon test runs (*i.e.*, what quantity of letters should be mailed where and what test criteria and parameters should be used), format, language, colors and pictures (Juanita Anderson 3778–81, 3827–28, 3830–32; CX 2110, p. 74; CX's 692A–D, 1368A–B; Joseph Anderson 3961–62, 3968–69; CX 2111, pp. 12, 49; Harris 5121). [72]

301. Mailing list brokerage services for MDC were handled by Marshall Sutton, a former employee of Florence Wolf, Inc. (Sutton 4162–65; F. 7). Sutton conducted business at MDC with Raymond Anderson, the only individual at MDC that he met in person (Sutton 4165). It was Raymond Anderson who placed MDC's orders with Sutton (Sutton 4166).

302. Small Business Data Processing supplied MDC with computer processing services (F. 238). Jay Sarbaugh, vice-president of Small Business Data Processing (Sarbaugh 3623), dealt with and received instructions from Raymond Anderson at MDC (Sarbaugh 3649; CX's 663, 854, 855).

303. Joseph Anderson provided daily reports to Raymond Anderson on MDC's Hauck Road plant operations, including reports on how many solicitations were mailed out each day, how much printing was done and which letter codes were used on the solicitations (Joseph Anderson 3954–55, 3973–74).

304. Raymond Anderson determined the price of the sewing machines sold by MDC through the mail (Joseph Anderson 3980; CX 2111, p. 32).

305. Selective Sampling supplied Treasure Chests to MDC (Fs. 14, 67, 184). Communications between Selective Sampling and MDC were directed to Raymond Anderson (CX's 748–50, 991, 992, 994, 997, 1000, 1003, 1006, 1572, 1574; Karniol 2047–48) because Selective Sampling considered him to be "the decision-maker" and in charge at MDC (Karniol 2048–49). Raymond Anderson was the individual who signed the correspondence sent to Selective Sampling (CX's 747, 993, 995, 1926). On one occasion, Raymond Anderson travelled to New York and

visited Selective Sampling in order to check on its packaging operation (Karniol 2041–42; CX 993).

306. Value Package supplied Treasure Chests to MDC (F. 14). Frank Taubes, president of Value Package (CX 978; RX 17), stated that most of his communications at MDC were with Raymond Anderson and that he dealt in person with Raymond Anderson (Taubes 2260, 2262). In 1973, Raymond Anderson went to New York to meet with Taubes and to discuss MDC's needs regarding promotional kits (Taubes 2261). Business correspondence between MDC and Value Package was from or to Raymond Anderson (CX's 697, 698, 978–81, 988; RX's 16, 17).

307. Grafton Products supplied the perfume for MDC's Treasure Chests (Fs. 15, 188, 199). Raymond Anderson initially approached Grafton with regard to supplying perfume to MDC and confirmed the relationship by verbally placing [73]the first order (Marcus 3226–28). Raymond Anderson was the only individual at MDC whom Edward Marcus, president of Grafton, dealt with in person (Marcus 3249). Communications between Grafton and MDC were directed to Raymond Anderson (CX 1011); Raymond Anderson signed correspondence sent to Grafton (CX's 1917, 1919).

308. Raymond Anderson determined the monetary value of MDC's Treasure Chest (Harris 5121; Juanita Anderson 3791–92), even though MDC was aware of the actual value of the products contained in the kits and had directed Grafton Products to place the "Beau Bien" perfume advertisement in *Harper's Bazaar* (Fs. 186, 187, 188, 202).

309. The vacation certificates that MDC offered in its consumer solicitations were supplied by several certificate companies (F. 13). Raymond Anderson dealt with and visited the certificate companies on behalf of MDC (Juanita Anderson 3777).

310. Raymond Anderson handled almost all correspondence from Attorneys General offices along with other problem correspondence (Juanita Anderson 3738–39). He also handled problems regarding the fulfillment of orders (Juanita Anderson 3743). Raymond Anderson created the "hillbilly" letters which notified customers of delays in the shipment of their orders (Juanita Anderson 3769; *e.g.*, CX's 68, 292).

311. Raymond Anderson licensed his Treasure Chest-Vacation Certificate Program to MDC in return for royalties amounting to 20% of gross sales (CX 668B). In 1972, he received royalty payments of $328,883.38 (CX 669). MDC also agreed to advance monies to Raymond Anderson at various times (CX 668B).

312. On June 28, 1974, separate voluntary petitions in bankruptcy were filed by Raymond Anderson and MDC (CX's 660A–CC, 671A–N; Fs. 1, 48).

313. In its bankruptcy petition, MDC stated that there existed "an additional 90,000 to 93,000 unsecured creditors . . . [whose] claims vary in value between $15.00 and $80.00." (CX 660L).

2. *Columbia Research Corporation*

314. Raymond Anderson has been and continues to be president and a director of CRC, and has participated in the operation of CRC in those respects (F. 45). [74]

315. Raymond Anderson and Joseph Anderson attended a bankruptcy auction of MDC's assets some time after June 1974. CRC purchased a large number of the Treasure Chests that Joseph Anderson had bought at the auction (F. 338).

316. CRC has been organized and operated as a family-held corporation, focused around Raymond Anderson and his family. Raymond Anderson's mother, Alberta Saal, was the sole stockholder of CRC (Third CRC Admissions, Requests 4–5). Raymond Anderson owned the residence which was listed as her address (F. 297). Raymond Anderson consulted with Juanita Anderson with regard to the hiring of personnel at CRC (Fs. 55, 318, 353). CRC has employed both Raymond Anderson and Joseph Anderson (Fs. 45, 52).

317. Raymond Anderson hired Joseph Anderson to work for CRC and informed the latter that his duties would be to help out with the Las Vegas operation of CRC's Vacation Certificate Program. Raymond Anderson paid for Joseph Anderson's moving expenses to Las Vegas (Joseph Anderson 4017–19; F. 52).

318. Raymond Anderson also asked Juanita Anderson to work for CRC; she was not actually employed by CRC although she did do interviewing of individuals in Chicago for employment by CRC and selected one person who was subsequently hired (Juanita Anderson 3837–40).

319. CRC has held neither shareholder meetings nor meetings of its board of directors (Third CRC Admissions, Requests 40–41). CRC's articles of incorporation contemplated that Raymond Anderson would be the sole director of the corporation (CX 1236D).

320. Raymond Anderson continued to use Marshall Sutton as CRC's mailing list broker; Sutton, at that time, was president of First National List Services, Inc. (Sutton 4148; Fs. 22, 301). Raymond Anderson approached Sutton in order to initiate the business relationship (F. 22). Raymond Anderson placed and signed CRC's orders and reorders, including orders of names from mailing lists that had been test lists (Sutton 4171–72, 4183, 4186–87).

321. Universal Data Systems, Inc. provided computer processing

services to Raymond Anderson and CRC (Fs. 23, 24). Universal established its business relationship with CRC at a meeting arranged by Marshall Sutton; the meeting was between Raymond Anderson and Eric Tiebauer, president of Universal (RX 62–1[illegible] –206–07). Universal dealt basically with Raymond Anderson at CRC (RX 62–218). Instructions to Universal came from Raymond Anderson at CRC (RX 62–214–15,–245). [75]

322. A. M. Sampling supplied Gift Cartons to CRC (Fs. 39, 72, 192). Raymond Anderson telephoned Frank Taubes, president of A. M. Sampling which was formerly known as Value Package (Taubes 2230; see F. 14), in order to initiate the business relationship (Taubes 2263, 2286). Taubes testified that he dealt in person with Raymond Anderson who visited him in New York to discuss CRC's needs as regards the promotional kits (Taubes 2285–86). Raymond Anderson informed A. M. Sampling that he wanted the kits to contain about $15.00 worth of merchandise (F. 193).

323. Bay Shore Yacht & Tennis Club supplied vacation certificates and accommodations in Florida to CRC customers (Fs. 26, 34). Raymond Anderson and Joseph Anderson met in person with Bryan McGuire, who had overall responsibility for Bay Shore, in June 1975, to tour Bay Shore's property in Florida (McGuire 2377, 2347–48, 2350). Business correspondence between Bay Shore and CRC was to or from Raymond Anderson (CX's 1535–37).

324. Complimentary Vacation Club has provided Las Vegas vacation services and gambling coupons to CRC (Kegley 4734, 4739–41). Its owner, Billy Dale Kegley (Kegley 4688), sent his two-nights-for-the-price-of-one accommodations directory along with a description of the program to Raymond Anderson in spring 1975 in order to solicit CRC's business (Kegley 4732, 4734). Kegley's testimony shows the success of his efforts:

> Q. As a result of the sending of this booklet to Columbia Research Corporation, did you and Columbia subsequently begin to do business?
>
> A. Yes.
>
> Q. During what period did you initially start doing business with Columbia Research Corporation?
>
> A. Approximately two to four weeks after I sent him [Raymond Anderson] the directory.
>
> Q. When was that?
>
> A. Sometime in 1975, April or May, I think.

best copy available

> Q. And during what period, after that time, did you do business with Columbia Research Corporation? [76]
>
> A. I did business with him [Raymond Anderson] for approximately six, eight, ten months and then I stopped doing business with him.
>
> Q. During that period of time, what did you sell him?
>
> A. I sold him my Complimentary coupons and my casino package.

(Kegley 4734).

In late 1976, approximately six to eight months after Kegley stopped doing business with CRC, he resumed selling his directory and casino packages to CRC (Kegley 4738–39); in May 1978, he began handling reservations for CRC customers in Las Vegas (Kegley 4803). Kegley sought to have Raymond Anderson convert the CRC program so as to use more two-nights-for-the-price-of-one accommodations directories (F. 263). Kegley also testified that, "I have had hundreds of phone calls from Mr. [Raymond] Anderson." (Kegley 4817).

325. The King 8 Hotel and Casino supplied accommodations and gambling packages to CRC customers in Las Vegas (Fs. 30, 36, 157, 219). Raymond Anderson arranged and signed the business agreement between CRC and the King 8 (Jenni 1903–04; CX's 703A–B, 706A). Billings to CRC and Genie Vacations and letters for payments past due were sent to Raymond Anderson (CX's 710, 1909).

326. The California Hotel and Casino provided gambling benefits to CRC customers in Las Vegas (Fs. 219, 220, 222). Raymond Anderson wrote a letter to the California Hotel and Casino stating that CRC and he intended to continue distributing certificates for the gambling benefits (CX 1656A–B) in response to a letter from the California Hotel and Casino notifying CRC that the gaming certificates would no longer be honored (CX 1655).

327. Miami-Las Vegas Vacation Bureau, Inc. provided vacation certificates and reservation booking services to CRC (Fs. 26, 30, 33). Raymond Anderson initiated and developed CRC's business relationship with Miami-Las Vegas Vacation Bureau (Joseph Anderson 4042, 4084–86). Raymond Anderson decided that Miami-Las Vegas Vacation Bureau would take over reservation bookings from Genie Vacations, Inc., and purchased several thousand vacation certificates from Miami-Las Vegas Vacation Bureau (Joseph Anderson 4085–86; CX 2111, p. 74). [77]

328. Raymond Anderson established the criteria by which CRC employees would decide whether or not to grant a refund to a customer (F. 278).

329. During CRC's period of active operation, a corporation named

Las Vegas V.I.P. Connection, Inc. also solicited some CRC customers to go on "ALL-EXPENSE-PAID MINI-MONEY GAMBLING JUNKETS." (CX's 543, 1953, 1961). The solicitation sent to prospective customers began as follows: "Dear G. Jenkins. . . . Columbia Research Corp. has advised us you plan to vacation in Las Vegas. . . ." (CX 543A). It also stated, "[W]e are affiliated with Genie Vacations (Genie Enterprises) of Las Vegas. . . ." (CX's 543D, 1953D, 1961D); Genie was CRC's Las Vegas reservation booking agent (Fs. 30, 32). The solicitation provided what it called an "Invite-a-Friend" form (CX's 543D, 547A–D, 1953D, 1958A–D, 1961D, 1966A–D), a term and form also used by CRC (*e.g.*, CX's 303, 341A). Las Vegas V.I.P. Connection, Inc. provided a toll-free telephone number for ordering by phone (CX's 544, 1957, 1964); the document was pictorially identical to CRC's document listing its toll-free telephone number (CX 591). The photograph that Las Vegas V.I.P. Connection, Inc. used in its solicitation (CX's 546A, 1955A, 1965A) was identical to a photograph that CRC used in its advertising (*e.g.*, CX's 536A, 1959). The solicitation provided for a "Special CRC Customer Price" of $50 rather than the normal membership cost of $65 a year (CX's 543A, D, 1953A, D, 1961A, D). The solicitation was signed by Toni Waldman (CX's 543B, 1953B, 1961B), and had a 505 North Lake Shore Drive, Chicago, Illinois address on the letterhead as well as on the pre-addressed envelope provided to consumers to return their orders in (CX's 543A, 545, 1953A, 1954, 1961A, 1963). Raymond Anderson has lived at 505 North Lake Shore Drive, Chicago, Illinois (Fifth CRC Admissions, Request 60; Joseph Anderson 4015). He has resided with Toni Waldman, and has used her name in the Las Vegas V.I.P. Connection, Inc. solicitations (Fifth CRC Admissions, Requests 58–59). Therefore, the inference can be made that Las Vegas V.I.P. Connection, Inc. is a company controlled by Raymond Anderson.

330. Thus, Raymond Anderson has formulated, directed and controlled the acts and practices of MDC and CRC, including those enumerated in Parts I and II of this decision (Third CRC Admissions, Request 30; Raymond Anderson Sanctions, p. 2). [78]

B. Joseph Anderson

1. *Market Development Corporation*

331. Joseph Anderson was an employee of MDC from 1969 until its termination in June 1974 (F. 49). He received a salary as well as commissions during the course of his employment (Joseph Anderson 4007; CX 720).

332. Joseph Anderson held a succession of positions of responsibility at MDC. At various times, he served as a sewing machine salesman,

sales manager of the door-to-door sewing machine sales force based at MDC's Hamilton Avenue address and general manager of MDC's Hauck Road plant where he was instructed by Raymond Anderson to oversee the printing, mailing, shipping and sewing machine repair operations (F. 50).

333. Joseph Anderson reported on a daily basis to Raymond Anderson, providing the latter with detailed information on MDC's Hauck Road plant operations (Fs. 51, 299(c)).

334. As part of his position at MDC's Hauck Road plant, Joseph Anderson answered consumer correspondence (Joseph Anderson 3991-92; CX 2111, p. 46). Correspondence also issued from MDC with his name on it; on at least one occasion, he used the title of "Sales Manager" in correspondence generated from MDC (Joseph Anderson 3949; CX 721).

335. Joseph Anderson dealt with Frank Taubes, of Value Package, by telephone regarding the contents of the kits that Value Package supplied to MDC (Joseph Anderson 3991; Taubes 2261). He was Small Business Data Processing's contact at MDC's Hauck Road plant (Sarbaugh 3649).

336. There are other indicia of Joseph Anderson's involvement in MDC's operations. He had the authority to hire employees for MDC (Joseph Anderson 3991). He made several trips on behalf of MDC, including a trip to New Jersey with Raymond Anderson to examine whether GCL Mercantile's sewing machines would be appropriate for MDC's program (Joseph Anderson 3989-91). He received blank checks from MDC's bookkeeping department and handled some of MDC's accounts payable, including authorizing the issuance of checks (Joseph Anderson 3996-97, 4005-06; CX 2111, p. 45; CX's 718, 19). [79]

337. Joseph Anderson was supervised by Raymond Anderson (Fs. 51, 299). However, Joseph Anderson testified that, "I operated under his instructions, but there was no—if I saw something that need[ed to be] done or something like that I could take it upon myself." (Joseph Anderson 3954). Therefore, Joseph Anderson exercised independent decision making responsibility at MDC.

2. *Columbia Research Corporation*

338. After MDC and Raymond Anderson filed voluntary petitions in bankruptcy in June 1974 (Fs. 1, 48, 312). Joseph Anderson and Raymond Anderson attended the bankruptcy auction of MDC's assets. Joseph Anderson bought a sizeable number of Treasure Chests at the auction and sold a large number of them to CRC (Joseph Anderson 3986-89).

339. Joseph Anderson was employed by CRC from May 1975 to July 1976. His duties involved managing CRC's vacation certificate program in Las Vegas, including eventually taking over the functions of Mike Alpert who was in charge of Genie Vacations, CRC's Las Vegas reservation booking agent. (F. 52; CX 2111, pp. 59, 62). He and Mike Alpert performed similar functions concerning CRC's Las Vegas operations (Joseph Anderson 4084; CX 2111, p. 111; Jenni 1915). Specifically, Joseph Anderson took care of incoming request forms, processing reservations and obtaining room accommodations (Joseph Anderson 4019; CX 2111, p. 62).

340. Joseph Anderson was a signatory on CRC's Las Vegas checking account (Joseph Anderson 4099).

341. While in Las Vegas, Joseph Anderson had a private office situated at Genie Vacations' 2128 Paradise Road office location (Joseph Anderson 4023). He hired and trained employees to undertake the same functions as Genie Vacations' employees. (Joseph Anderson 4026). He was involved in sending out reservation confirmations and supervising other employees who sent out reservation confirmations (Joseph Anderson 4028).

342. Acting in his capacity as manager of CRC, Joseph Anderson negotiated contracts with hotels and motels in Las Vegas to provide accommodations for CRC customers, including the King 8 Hotel and Casino, the Lucerne Motel, and Colonial House and the Bali Hai (Joseph Anderson 4027, 4032–33; CX 2111, pp. 69–70, 78; CX 706A–B; Jenni 1912, 1914–15). He delivered checks from CRC to the motels and hotels as payment (Joseph Anderson 4061). He also purchased gaming certificates for CRC customers. (Joseph Anderson 4073). [80]

343. Joseph Anderson and the King 8 Hotel and Casino worked closely together in implementing CRC's Las Vegas program. Joseph Anderson was physically at the King 8 at a Genie Vacations' desk counter in the lobby almost every day. He supplied CRC customer names to the King 8 by means of a manifest (Jenni 1910–11). The King 8 submitted billings to Joseph Anderson for the rooms and gambling packages used by CRC under its program (Jenni 1909–10, 1916–17; CX's 1913, 1914, 1909). Joseph Anderson was responsible for the scheduling of rooms at the King 8 and taking care of CRC's customers when they arrived at the King 8 (Jenni 1918–19). He made suggestions to the King 8 about the problem of people standing in line to redeem their gaming certificates (Jenni 1961–62). When the King 8 received complaints from CRC customers about CRC's program, it brought the complaints to the attention of Joseph Anderson (Jenni 1925–26).

344. Even when both Joseph Anderson and Mike Alpert were in Las Vegas together, the King 8 Hotel and Casino dealt with Joseph

Anderson (Jenni 1914–15). Joseph Anderson dealt with Phil Gold, the owner of Miami-Las Vegas Vacation Bureau, Inc., and sought, along with Genie Vacations, to remedy problems relating to services that Gold was to perform for CRC's Las Vegas customers (Joseph Anderson 4042–51, 4085).

345. Joseph Anderson handled consumer complaint correspondence, including requests for refunds (Joseph Anderson 4082, 4095).

346. Joseph Anderson continued to receive checks from CRC for a period of time after he left Las Vegas (Joseph Anderson 4110).

347. In June 1975, Joseph Anderson and Raymond Anderson went to meet Bryan McGuire to tour McGuire's Bay Shore Yacht & Tennis Club property in Florida (F. 323).

348. Thus, Joseph Anderson has taken part in formulating, directing and controlling the acts and practices of MDC and CRC, including those enumerated in Parts I and II of this decision.

C. Juanita Anderson

349. Juanita Anderson was an MDC employee from the company's inception in 1969 until its termination in June 1974 (F. 54). [81]

350. Juanita Anderson held a supervisory position during the course of her employment by MDC (F. 54). She had the authority to sign Raymond Anderson's name to company checks, including customer refund checks (Juanita Anderson 3754–55).

351. Juanita Anderson's functions included handling customer complaints sent to MDC from Better Business Bureaus, attorneys and Attorneys General offices (Juanita Anderson 3741–42; Flach 3531, 3525). She decided which complaints concerning non-delivery of sewing machines were to be responded to by shipping sewing machines from MDC, and instructed a subordinate, Lois Flach, in that regard (Flach 3537–41). Juanita Anderson also had the power to order refunds by MDC to customers (Juanita Anderson 3751–52).

352. Juanita Anderson occasionally dealt with William Karniol of Selective Sampling and Marshall Sutton of Florence Wolf for business purposes (Karniol 2047, 2115–16; Sutton 4165–66).

353. Juanita Anderson had the authority to hire employees both at MDC and, initially, at CRC even though she was not employed by CRC (Flach 3506; Fs. 55, 316, 318).

354. The record evidence is insufficient to support the contention (Complaint ¶ 1; CPF 266) that Juanita Anderson took part to a significant degree in formulating, directing or controlling MDC or CRC's acts and practices. [82]

LEGAL DISCUSSION

It is a violation of Section 5 of the Federal Trade Commission Act to offer goods and services to the public through unfair or deceptive means. Accordingly, it is unlawful to disseminate statements and representations in advertising and promotional materials which have the tendency and capacity to mislead or deceive prospective purchasers. *See, e.g., Speigel, Inc.* v. *F.T.C.*, 494 F.2d 59 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974). And, it is settled law that when advertising on its face demonstrates the requisite tendency and capacity, the Commission may find violation without seeking out actual instances of deception to the public. *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Mongtomery Ward and Co.* v. *F.T.C.*, 379 F.2d 666 (7th Cir. 1967); *Double Eagle Lubricants, Inc.* v. *F.T.C.*, 360 F.2d 268, 270 (10th Cir. 1965); *Regina Corp.* v. *F.T.C.*, 322 F.2d 765 (3d Cir. 1963); *Charles of the Ritz Dist. Corp.* v. *F.T.C.*, 143 F.2d 676 (2d Cir. 1944). Nevertheless, many consumer witnesses testified in this proceeding, as noted throughout the previous factual discussion (*see, e.g.*, Fs. 108, 125, 139, 191, 215, 223, 231, 244, 250, 260, 262).

The Violations Found And Not Found

Based upon the facts as found, I hold that respondents have violated Section 5 in the following particulars:

A. MDC has represented to consumers that it conducted contests or sweepstakes whereas, in numerous instances, MDC's millions of mail solicitations involved no contest, nor any element of skill or chance, but were solely for the purpose of obtaining sales or leads for sales (Fs. 59, 60, 61, 62). Furthermore, MDC has represented that it would award a specific number of products as contest prizes in a "giant $300,000 Sweepstakes" (CX 1332B). In this instance, MDC specified, *inter alia*, that 10 Dodge Challengers and 50 Zenith color TV sets would be given away. However, no such automobiles or TV sets were awarded (Fs. 63, 64). The utilization of fictitious promotional plans and illusory contests as a device to obtain leads to prospective purchasers has been held to constitute a deceptive practice violative of Section 5. *Household Sewing Machine Co.*, 76 F.T.C. 207, 229–31, 238 (1969); *Twentieth Century Business Builders, Inc.*, 23 F.T.C. 1311, 1316–19 (1939). [83]

B. Both MDC and CRC have falsely represented to consumers, through the use of their trade names and various promotional statements, that they were engaged in market research and analysis (Fs. 65–75). To misrepresent the character of one's business in order to induce the purchase of goods or services has long been proscribed.

Colgate-Palmolive, 380 U.S. at 388; *F.T.C.* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *Niresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337, 340 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *Product Testing Co.*, 64 F.T.C. 857, 882–83, *aff'd*, 339 F.2d 603 (3d Cir. 1964).

C. Both MDC and CRC have falsely represented to consumers that they were engaged in incentive programs or promotions (Fs. 76–83). *See, e.g., Basic Books, Inc.*, 56 F.T.C. 69, 79–81 (1956), *aff'd*, 276 F.2d 718 (7th Cir. 1960).

D. Both MDC and CRC have represented to consumers that they had co-sponsors or represented other companies when, in fact, no such special relationship with the manufacturers and suppliers of goods and services distributed by either MDC or CRC actually existed (Fs. 84–91). Representations that falsely claim, directly or by implication, a relationship with or a connection to other entities, such as arrangements for co-sponsorship or other representation, violate Section 5. *Sterling Drug, Inc.*, 47 F.T.C. 203, 209–10, 213 (1950); *The Richmond Brothers Co.*, 36 F.T.C. 482, 485–86 (1943); *Champion Battery Co.*, 34 F.T.C. 433, 443–46 (1941).

E. Both MDC and CRC have represented that consumers were specially selected to receive their offers. However, each respondent company disseminated its solicitations by means of mass mailings sent to millions of consumers throughout the United States (Fs. 92–101). Moreover, MDC has falsely represented that its offer was a "once-in-a-lifetime" opportunity (Fs. 102–03). The Commission's power to proscribe false representations that prospective customers were specially selected recipients of offers has long been established. *F.T.C.* v. *Standard Education Society*, 302 U.S. 112, 113–15, 117 (1937); *Kalwajtys* v. *F.T.C.* 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); *American Music Guild, Inc.*, 68 F.T.C. 13, 22–23, 34–35 (1965); *Basic Books*, 56 F.T.C. at 79–81. [84]

F. (1) MDC has represented that consumers receiving its solicitations were contest or sweepstakes winners and, as such, were entitled to "awards," "gifts," "prizes," "winnings," "bonuses," and/or "free" goods and services (Fs. 104, 105, 109). However, in numerous such instances, consumers did not actually win anything because MDC did not conduct actual contests or sweepstakes; moreover, consumers were only entitled to purchase the goods and services offered by MDC at the stated price (Fs. 62, 106, 110, 111). Misrepresentations that mislead the consumer into believing that a particular product or service is being given away at no charge have long been considered unlawful. *Standard Education Society*, 302 U.S. at 113–17; *Kalwajtys*, 237 F.2d at 656; *American Music Guild*, 68 F.T.C. at 32; *Basic Books*, 56 F.T.C. at

79-81; *Moye Photographers*, 50 F.T.C. 926, 930 (1954); *Champion Battery*, 34 F.T.C. at 444, 446.

(2) CRC has represented that consumers receiving its solicitations were winners and, as such, were entitled to "gifts," "bonuses," and/or "free" goods and services (Fs. 107, 112). However, consumers did not actually win anything, but rather had to pay CRC a fee of $15.00 or $15.95 in order to receive the goods and services offered by CRC. (Fs. 107, 113, 114). The same case law applicable to MDC in the previous paragraph governs here as well.

G. Both MDC and CRC have represented to consumers that they were offering a "free" vacation (Fs. 115, 120). However, consumers responding to each of respondents' solicitations were required to pay transportation charges to the vacation site and, often, peak season accommodations charges; consumers often also had to take substantial and even extraordinary steps in order to realize all the benefits of MDC and CRC's "free" vacation packages (Fs. 116-19, 121-29). Representations such as these, which convey the false impression that something is being given away for nothing, tend to mislead the consumer as to the cost of the product or service and, therefore, are deceptive and unlawful. The caselaw discussed in Section F, above, is applicable here as well. Moreover, in their solicitations, respondents have failed to disclose, or have failed to disclose clearly and conspicuously, some of these additional costs and conditions imposed upon consumers (Fs. 117, 122, 124, 126). The failure to affirmatively disclose material facts which would affect a consumer's decision to purchase constitutes an unfair and deceptive act or practice under Section 5. *Pfizer, Inc.*, 81 F.T.C. 23, 58, 62 (1972); *All-State Industries of North Carolina, Inc.*, 75 F.T.C. 465, 490-94, *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970). And, as [85]the court stated in *Ward Laboratories, Inc.* v. *F.T.C.*, 276 F.2d 952, 955 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960), "[t]he power of the FTC to require affirmative disclosure where necessary to prevent deception has long been recognized [citations omitted]."

H. CRC has falsely represented that consumers had a limited time, usually 10 days, within which to respond to the offers contained in the solicitations, and that failure to meet the time limit would result in forfeiture of any right to "accept" such offers (Fs. 138, 139). Such a misrepresentation is misleading and constitutes a deceptive practice. *E.g.*, *Basic Books*, 56 F.T.C. at 80-81; *National Optical Stores Co.*, 46 F.T.C. 694, 701-02, 703 (1950).

I. Both MDC and CRC have falsely represented that consumers responding to solicitations could choose the time, location and accommodations for their vacations (Fs. 140-60). For instance, certain hotels and resorts which MDC and CRC specified as choosable accommodations to choose from were not available (Fs. 142, 143, 153, 154). CRC customers were not able to be accommodated in Las Vegas for Thursday, Friday, Saturday or holiday arrivals (F. 147). The Commission has held that misrepresentations of this nature are violative of Section 5. *American Music Guild*, 68 F.T.C. at 33–34, 35.

J. Both MDC and CRC have represented to consumers that the goods and services offered in the solicitations had specific values, retail values and total values (Fs. 183, 190, 198, 211, 214). MDC also represented that consumers responding to its offers would realize specific monetary savings (F. 211). However, the products and services offered by MDC and CRC did not have the values that they were represented to have and their purchase did not result in the promised savings. Rather, MDC and CRC artificially inflated the actual values; moreover, the use of the goods and services provided was often conditioned in such a way that it was difficult or impossible for consumers to realize the values that were represented (Fs. 184–89, 192–97, 199–204, 212, 213, 215–26). Misrepresentation as to the price of the product or service being offered has been deemed misleading and deceptive in a long series of court and Commission cases. *See, e.g.*, *Colgate-Palmolive Co.*, 380 U.S. at 387; *Standard Education Society*, 302 U.S. at 113–17; *Niresk Industries*, 278 F.2d at 340; *Kalwajtys*, 237 F.2d at 656; *Thomas* v. *F.T.C.*, 116 F.2d 347, 348–49 (10th Cir. 1940); *Grolier, Inc.*, 91 F.T.C. 315, 482–83; *Estee Sleep Shops, Inc.*, 65 F.T.C. 274, 284–85 (1964); *Giant Food, Inc.*, 61 F.T.C. 326, 344–51 (1962), *aff'd*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964); *George's Radio and Television Co.*, 60 F.T.C. 179, 192–94 (1962). *See also Guides Against Deceptive Pricing*, 16 CFR 233 (1978). [86]

K. Both MDC and CRC have falsely represented that all of the household and cosmetic products contained in the Treasure Chests and Gift Cartons offered in their solicitations were full-sized, as opposed to sample-sized, products (Fs. 205–10). Misrepresentation of this type has been held to be misleading and deceptive under Section 5. *See Consumers Home Equipment Co.* v. *F.T.C.*, 164 F.2d 972, 973 (7th Cir. 1947); *Tri-State Printers, Inc.*, 53 F.T.C. 1019, 1032–33 (1957); *Champion Battery*, 34 F.T.C. at 444, 445, 446.

L. Both MDC and CRC have falsely represented that their offers were not connected to the sales promotion of other goods or services, *i.e.*, land sales programs, by failing to affirmatively disclose to consumers in their solicitations that the offers were, in fact, sometimes connected to such sales promotions (Fs. 227–32). The failure to affirmatively disclose material facts which would affect a consumer's decision to purchase constitutes an unfair and deceptive act or practice under Section 5. The case law discussed in Section G, p. 84, is applicable here as well.

M. MDC has implicitly represented to consumers that it would bear the delivery costs of its sewing machines (F. 233). However, MDC's customers had to pay the delivery costs of the sewing machines shipped to them, often paying charges that were substantially higher than the actual shipping charges (Fs. 234–36). Representation that the cost of a product or service is all-inclusive, or free, are false and misleading when the customer is required to pay delivery costs. *Tri-State Printers*, 53 F.T.C. at 1033. Such representation failed to reveal the total out-of-pocket costs that consumers would incur. The failure to affirmatively disclose material facts which would affect the consumer's decision to purchase constitutes an unfair and deceptive act or practice under Section 5. The caselaw discussed in Section G, p. 84, is applicable here as well. As the court stated in *Tashof* v. *F.T.C.*, 437 F.2d 707, 714 (D.C. Cir. 1970), "we have long since passed the point where the power of the Commission to reach statements that are deceptive because they contain less than the whole truth can be doubted."

N. Both MDC and CRC have implicitly represented to consumers that the goods and services ordered would be delivered (Fs. 237, 254). However, in many instances, MDC and CRC failed to deliver ordered goods and serivces (Fs. 238–53, 255–69). For example, both respondents continued to accept and process customer orders that they were unable to fill, and did so for significant periods of time after they had become unable to fill [87]such orders, because of the build-up of large backlogs of orders and their failure to purchase sufficient quantities of and make sufficient arrangements for ordered goods and services (Fs. 241, 246–48, 258). On occasion, CRC also failed to fill customers' orders properly by making substitutions for what had been ordered (Fs. 261, 263). Failure to deliver is an appropriate matter for regulation under Section 5. *Jay Norris Corp.*, 91 F.T.C. 751, 836–37, 839 (1978), *aff'd*, No. 78-4151 (2d Cir., decided May 1, 1979); *Tri-State Printers*, 53 F.T.C. at 1032, 1033–35. *See also* Trade Regulation Rule on Mail Order Merchandise, 16 CFR 435 (1978).

O. Both MDC and CRC have represented to consumers that there was no financial risk involved in accepting the offers because of an unconditional refund policy and a "100% moneyback guarantee" (Fs. 270, 272, 276, 277). Contrary to such representation, dissatisfied consumers did not always receive, or did not always promptly receive, refunds from MDC and CRC. (Fs. 273–75, 281–83). Representation that refunds will be made where, in fact, there is a failure to provide refunds constitutes a deceptive practice under Section 5. *Goodman* v. *F.T.C.*, 244 F.2d 584, 600–01 (9th Cir. 1957); *Jay Norris*, 91 F.T.C. at

836-39; *National Optical Stores*, 46 F.T.C. at 701-02, 703; *Cookware Associates*, 40 F.T.C. 654, 660 (1945). *See also* Trade Regulation Rule on Mail Order Merchandise, 16 CFR 435 (1978).

P. It is well established that the Commission has the power to regulate the dissemination of advertising claims where respondents do not, at the time they make such claims, have a reasonable basis for so doing. *Tashof*, 437 F.2d at 715; *Jay Norris*, 91 F.T.C. at 852-54; *Porter and Dietsch, Inc.*, 90 F.T.C. 770, 866 (1977); *National Commission on Egg Nutrition*, 88 F.T.C. 84, 191 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 99 S. Ct. 86 (1979); *National Dynamics Corp.*, 82 F.T.C. 488, 549, 553 (1973), *remanded in part on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 463 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *Pfizer, Inc.*, 81 F.T.C. 23, 62-64 (1972). The record evidence clearly demonstrates that MDC and CRC did not have a reasonable basis for the claims contained in their solicitations prior to disseminating such solicitations (Fs. 284-94). [88]

I further hold that the following allegations of the complaint were not adequately supported by the record evidence and, therefore, are not found to violate Section 5 on that basis:[12]

A. Both MDC and CRC have represented that consumers were entitled to the goods and services offered for only a registration, handling and service charge (Fs. 130, 132). However, any relationship between such charges and the retail price of the goods and services offered by MDC and CRC was not demonstrated (Fs. 131, 133).

B. MDC has represented that 340,000 consumers accepted its offers (F. 134). However, the truth or falsity of this representation was not established (F. 135).

C. MDC has represented that consumers had a limited time, usually 10 days, within which to respond to the offers contained in the solicitations, and that failure to meet the time limit would result in forfeiture of any right to "accept" such offers (F. 136). The record evidence did not sufficiently address this allegation (F. 137).

D. Both MDC and CRC have represented that the vacation coupons offered to consumers had specific total values (Fs. 161, 164). Although it would have been difficult or impossible for consumers to realize the full value of such coupons, the respondents' representations regarding such monetary value were not shown to be unlawful (Fs. 162, 163, 165, 166).

E. MDC has represented that the sewing machines offered to consumers were sold throughout the United States (F. 167). Complaint counsel did not meet their burden of proof as to this allegation (F. 168).

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[12] As noted below, all of Paragraph seven of the complaint was taken as established adversely to Raymond Anderson in his individual capacity based upon the Raymond Anderson sanctions order.

F. MDC has represented to consumers that its sewing machines had a 25-year guarantee and would be serviced under this guarantee throughout the United States. (Fs. 169, 271). Complaint counsel did not meet their burden of proof as to this allegation (Fs. 170, 171).

G. MDC has represented to consumers that its sewing machines were used in home economics classes throughout the United States (F. 172). Complaint counsel did not meet their burden of proof as to this allegation (Fs. 173, 174). [89]

H. MDC has represented that the sewing machines offered to consumers had a specific retail price. (F. 175). However, complaint counsel did not sufficiently demonstrate that the sewing machines purchased by consumers from MDC did not, in fact, have such retail prices (Fs. 176–79).

I. MDC has represented to consumers that they would receive discount certificates having specific monetary values that could be applied toward the regular retail price of the sewing machines being offered (F. 180). However, the worth of such discount certificates was not established (F. 182).

A few additional points require comment:

The Sanctions. As mentioned heretofore, sanctions under Rule 3.38 were imposed upon respondents CRC and Raymond Anderson for their failure to comply with discovery subpoenas in this case. In opposing such sanctions, these respondents contended, *inter alia*, that the Commission lacked the legal authority to promulgate Rule 3.38. This, however, is not a matter upon which I am authorized to make a ruling. As an administrative law judge of this agency, I am bound to accept the validity of its Rules of Practice. Any challenge to the sanctions provisions of Rule 3.38 should be brought before the Commission itself or the federal courts.

Two sanctions orders were issued on November 1, 1977 one pertaining to CRC, the other to Raymond Anderson in his individual capacity. The CRC order, incorporating sanctions (2), (3) and (4) of Rule 3.38(b), established adversely to CRC complaint paragraphs one, three and subparagraphs 1, 3–9, 11–12, 15, 22–27, 29–30 of paragraph seven; prohibited the use on defense of the withheld information; and permitted the introduction by complaint counsel of secondary evidence, including self-authenticating consumer complaint letters.[13] The Raymond Anderson order, incorporating sanctions (2) and (3) of the rule, established adversely to Raymond Anderson complaint paragraphs one, three, four and all of seven, and applied sanction (3) insofar as it related to testimony concerning Raymond Anderson's defense. [90]

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[13] In addition to the consumer letters in evidence, there was testimony concerning the receipt of almost 4,000 consumer complaint letters by the Commission's Cleveland Regional Office (Benowitz 4325; CX 2067).

Despite the imposition of these sanctions, some testimony and evidence concerning CRC and Raymond Anderson was permitted to be introduced into the record pertaining to "sanctioned" matters. My reasoning for so doing was based upon the difficulty anticipated in segregating information pertaining to these two respondents from that pertaining to the other respondents. I also believed that in terms of framing any order which might issue, it would be useful and desirable to have an evidentiary picture of the business practices of all respondents.

Independent Contractors. Respondents contend that they should not be held responsible for the acts of certain individuals or companies who handled vacation reservations for CRC. Respondents describe companies such as Miami-Las Vegas Vacation Bureau, Inc. and Genie Vacations (or Genie Enterprises) as "independent contractors" rather than as "agents," and seek insulation from any wrongdoing these nonparties may have done.[14] There is no dispute, however, that these companies were authorized to act on CRC's behalf in fulfilling customer orders, or that such authorized acts lasted for significant periods of time. Under controlling case law, respondents may not avoid liability for their actions despite claimed efforts to ameliorate problems caused by their representatives. *See Goodman* v. *F.T.C.* 244 F.2d 584, 588-93 (9th Cir. 1957), citing *inter alia*, *Standard Distributors, Inc.* v. *F.T.C.*, 211 F.2d 7, 13 (2d Cir. 1954) and *International Art Co.* v. *F.T.C.*, 109 F.2d 393, 396 (7th Cir. 1940). *See also Star Office Supply Co.*, 77 F.T.C. 383, 444-46 (1970); *Wilmington Chemical Corp.*, 69 F.T.C. 828, 925-26 (1966).

Satisfied Customers. Respondents refer to the stipulated testimony of 40 satisfied customers as establishing "that the program offered by CRC is not misleading or deceptive in any aspect." (RPF p. 7). They go on to state (*id.* at 7-8):

> The consumer testimony of people who actually took advantage of CRC's promotion established that they received the items ordered on time. After taking advantage of the program each felt that the program was not misleading or deceptive in any respect. Each of these 40 customers stated that the meal and beverage package, the gaming package accommodations, and package of household goods were as [91]represented. They even went as far as to say that if given the opportunity they would take advantage of the offer of CRC again. This is testimony which was stipulated to by complaint counsel (Stipulation as to consumer testimony filed 10/30/78).

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[14] RPF 97 states, *inter alia*, that Miami-Las Vegas Vacation Bureau "breached agreements with numerous persons. It failed to refund deposits, and honor reservations in numerous instances."

Respondents' argument is legally unsound. In *Basic Books* v. *F.T.C.*, 276 F.2d 718, 720-21 (7th Cir. 1960), the court held:

> It may have been possible and may be assumed arguendo that Basic Books could have called twenty trustworthy witnesses to testify that such representations had not been made to them. Such evidence, however, would not refute the testimony which was previously given by the fifteen witnesses that such misrepresentations had in fact been made to them. That a person or corporation, through its agents, may have made correct statements in one instance has no bearing on the fact that they made misrepresentations in other instances. The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.

See also Independent Directory Corp. v. *F.T.C.*, 188 F.2d 468, 471 (2d Cir. 1951).

Miscellaneous. Respondents assert that irregularities in their operations were not their fault. Blame is assigned to a number of individuals and events which respondents say were beyond their control, such as: (1) "enormous" problems existing in the mail order industry, including nondelivery, misdelivery, computer error, consumer error and theft; (2) a dock strike, causing delays in shipments; (3) a strike of culinary workers in Las Vegas, temporarily closing lodging facilities; (4) the strength of the Japanese yen and devaluation of the dollar, putting financial pressure on sewing machine prices; (5) gasoline shortages due to the Arab oil embargo, making consumers unwilling to drive to vacation locations; (6) adverse publicity concerning respondents' business problems, causing further consumer alarm; (7) certain hotels failing to honor vacation certificates; (8) misunderstandings on the part of various casino personnel; and (9) business disputes between third parties, affecting respondents' operations. [92]

Without minimizing any of the above, I cannot make a finding as to the extent such factors had a bearing upon the violations found in this case. Certainly enough has been shown in the factual discussion to lay the principal blame on the respondents. Respondents created their promotional literature; they are responsible for the content contained therein. Most of the challenged representations made in such solicitations do not have, on their face, any relationship to these factors. Accordingly, respondents' attempt to exculpate themselves by placing blame elsewhere must be rejected.

Respondents also maintain that "any practices which could have even been remotely attributable to [them] and which would have caused consumer dissatisfaction have been voluntarily corrected, or are of such an insignificant nature as to not require the issuance of any order . . . other than one dismissing the complaint." (RPF, pp. 1-2). On the issue of voluntary cessation of challenged practices, the cases are legion that the defense of "abandonment" is not available at this stage of a proceeding. Respondents have shown no reason why an exception to this rule should be made here. As to the insignificant nature of respondents' acts and practices, I note that while only a small amount of money is involved in each consumer transaction, those amounts become substantial when multiplied by the many thousands of consumers who have entered into transactions with respondents. An order is, therefore, necessary in this case.

The Remedy. The provisions of the order issued in this case are specifically tailored to prevent recurrence of each of the violations found. In framing the order, I declined to adopt complaint counsel's proposal that a provision effectively excluding respondent Raymond Anderson from ever again engaging in any way in the mail order business be included. However, complaint counsel's contentions in this respect deserve some attention.

It is urged that this type of relief is necessary because of the widespread and permeating nature of the deceptive acts and practices found in this case, and because of Raymond Anderson's past and present involvement with law enforcement authorities.[14] Complaint counsel argue in their brief:

> The reason why more drastic relief is required is because Raymond Anderson is an habitual offender and a civil recidivist. As pointed out by [Proposed] Findings of Fact 283–285, Raymond Anderson has been [93]committed to perpetrating unfair acts upon the public for an extended period of time. *See, e.g., Kugler v. Market Development Corp.*, 124 N.J. S.Ct. 314, 306 A.2d 489 (1973); *Minn. v. Market Development Corp.* (Minn. D.C. 2nd Dist.), File No. 386646 (1973). Several states which resorted to legal action against CRC and Raymond Anderson previously had to resort to legal action against MDC and Raymond Anderson. California, by the District Attorney of San Francisco, has filed grand theft felony criminal proceedings against CRC and Raymond Anderson for alleged violations of the civil order entered in California. The Federal Trade Commission's involvement with Raymond Anderson goes back at least to 1957 with the entry of an order against Raymond Anderson, in *Universal Sewing Service, Inc*,. 54 F.T.C. 643 (1957), which involved deception in the sale of sewing machines; deception which has been shown to have occurred approximately fifteen years later in *Market Development Corporation*. Raymond Anderson has been the subject of Postal Service proceedings which were mooted because of his bankruptcy in 1974. Yet, even before the final adjudication in bankruptcy, Raymond Anderson had resumed the same business by a subsequent corporation, and branches out to other corporations such as Las Vegas V.I.P. Connection, Inc. ([Proposed] Findings of Fact 253).

(CB p. 47). Despite the above, and despite all the power of this agency to "fence in" or to "close all roads," care must be taken that an order not be punitive. As stated in *Arthur Murray Studio of Washington*,

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[14] In making my factual findings and reaching my legal conclusions in this case, I have accorded no weight to the existence of any other legal proceeding involving respondents.

Inc. v. *F.T.C.*, 458 F.2d 622, 625 (5th Cir. 1972), "the remedy should be no broader in restricting legitimate acts than is reasonably necessary," and "[t]he right of petitioners to contract must be accommodated by the Commission if at all possible with its statutory duty to formulate a remedy to eliminate unfair and deceptive trade practices, once such practices have been found." I believe that legal principle to be controlling in the case of respondent Raymond Anderson, and that my order accomplishes the goal stated.

There is no question, however, that Raymond Anderson must be included in the order in his individual capacity. As detailed in the Findings, he has been and is the central figure in the business operations of both corporate respondents, and was instrumental in the violations found in this case. **[94]**

As to respondent Joseph Anderson, he too must be included in the order in his individual capacity. The Findings indicate that, although he operated under his father's instructions, the extent of his participation in the corporate affairs of CRC and MDC render him individually liable.

On the other hand, no useful purpose would be served by issuing an order as to respondent Juanita Anderson. She had no significant involvement with CRC, and the record does not indicate that she participated to any substantial degree in the formulation, direction and control of the business operations of MDC. And, as stated by complaint counsel, "it does not appear that she is likely to resume illegal activity." (CB p. 49). Hence, the complaint will be dismissed as to Juanita Anderson in her individual capacity.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondents Market Development Corporation, Columbia Research Corporation, Raymond Anderson, Juanita Anderson and Joseph Anderson.
2. This proceeding is in the public interest.
3. The aforesaid acts and practices of the respondents as herein found were and are to the prejudice and injury of the public and constitute unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.
4. The order entered in this proceeding is proper in scope and reasonably related to the violations found. **[95]**

ORDER

I.

It is ordered, That respondents Columbia Research Corporation, Raymond Anderson and Joseph Anderson, their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of vacation certificates and packages, sewing machines, household and cosmetic products, mail order goods, or other goods or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Making or participating in the making, in any manner and by any means, of false, misleading or deceptive representations for the purpose of aiding in the securing of leads or prospects for the sale of any product or service, the demonstrating of any product or service, the selling of any product or service, the distributing of any product or service, or any other purpose.

(2) Representing, in any manner and by any means, that respondents are conducting a contest, unless:

(a) the contest is bona fide;

(b) all prizes advertised to be awarded will be awarded; and [96]

(c) respondents maintain all records pertaining to such contest for three (3) years subsequent to the end of the contest.

(3) Representing, in any manner and by any means, that recipients of respondents' solicitations are winners, or that prizes, awards or gifts will be given, or the conditions under which such prizes, awards or gifts will be given, including, but not limited to, representation by use of such terms as "prizes," "awards," "winnings," "gifts," "bonuses," "free" or terms of similar import and meaning, unless the recipients of such prizes, awards or gifts incur no financial or other obligation.

(4) Misrepresenting, in any manner and by any means, the character of any business conducted by respondents, including, but not limited to, misrepresentation through misleading corporate names, misleading titles for corporate officers, or statements or expressions conveying that respondents engage in market research and analysis, conduct incentive programs or promotions, or make use of a special method of selecting prospective customers to receive respondents' solicitations.

(5) Representing, in any manner and by any means, that respondents have co-sponsors or represent other companies, unless: [97]

(a) the co-sponsorship or representation of another company is bona fide; and

(b) the co-sponsors or represented companies have actual knowledge of and have approved the use of any such representation by respondents prior to respondents' representation to any third party.

(6) Representing, in any manner and by any means, that recipients of respondents' solicitations have a limited time within which to reply to or accept respondents' offers, unless such time limitation is bona fide.

(7) Representing, in any manner and by any means, that recipients of respondents' solicitations can exercise a choice regarding the selection of any product or service offered by respondents, including, but not limited to, vacation times, locations or accommodations, unless such choice selections are actually made available and recipients receive a response to their indication of such choice within a reasonable time period. For purposes of this paragraph, "a reasonable time period" shall be:

(a) that period of time specified in respondents' solicitation if such period is clearly and conspicuously disclosed in the solicitation; or [98]

(b) if no period of time is clearly and conspicuously disclosed, a period of thirty (30) days following the date that the recipient's indication of choice is received by respondents or by a designated agent of respondents.

(8) Misrepresenting, in any manner and by any means, the nature of respondents' goods and services, the stated value of their goods and services, the total cost of their goods and services, the retail price of their goods and services, or any other price or value against which the goods and services offered in respondents' solicitations are being compared, including, but not limited to, misrepresentation by use of such terms as "full-size," "savings," "value," "special," "retail price," "regular price," "list price," "former price" or terms of similar import and meaning, or misrepresentation by failing to clearly and conspicuously disclose, in the solicitation or other promotion, that purchasers will or may incur additional costs in connection with the purchase of respondents' goods and services, such as delivery costs, and the approximate amount of each additional cost.

(9) Failing to clearly and conspicuously disclose, in any manner and by any means, in any solicitation or other promotion, any relationship between respondents' offer [99]and the subsequent sales promotion of other products or services by respondents and/or other companies, including, but not limited to, the promotion of land or property sales programs.

(10) Failing to deliver goods or perform services ordered by purchasers from respondents within a reasonable time period. If delivery or performance is unable to be completed within such a reasonable time period, then respondents shall clearly and conspicuously offer in writing to such purchaser, no later than at the expiration of

the reasonable time period, an option either to consent to a delay in delivery or performance or to cancel his or her order and receive a full refund which shall be sent by respondents by first class mail within seven (7) working days of the date on which respondents receive such purchaser's notice of cancellation.

For purposes of this paragraph, "a reasonable time period" shall be:

(a) that period of time specified in respondents' solicitation if such period is clearly and conspicuously disclosed to the purchaser in the solicitation; or [100]

(b) if no period of time is clearly and conspicuously disclosed, a period of thirty (30) days following the date that the purchaser's order is received by respondents or by a designated agent of respondents.

(11) Representing, in any manner and by any means, that any product or service offered in respondents' solicitations is guaranteed or warranted, including, but not limited to, representation by use of such terms as "guarantee," "warranty," "money-back guarantee" or terms of similar import and meaning, unless the terms, conditions and limitations of the guarantee or warranty, the identity of the guarantor or warrantor and the manner in which the guarantor or warrantor will perform thereunder are clearly and conspicuously disclosed in writing in the solicitation, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of such guarantee or warranty.

(12) Failing to respond to each and every written inquiry concerning transactions with customers within seven (7) working days after the date respondents receive such inquiry.

(13) Making or participating in the making, in any manner and by any means, of any of the above representations [101]unless respondents actually have a reasonable basis for so doing.

II.

It is further ordered, That respondents Columbia Research Corporation, Raymond Anderson and Joseph Anderson, their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of vacation certificates and packages, sewing machines, household and cosmetic products, mail order goods, or other goods or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain:

(1) Legible copies of all written inquiries concerning transactions with customers, and the responses thereto. Such correspondence shall

be maintained for a period of not less than three (3) years from the date each piece of correspondence is received or sent by respondents.

(2) Records which disclose the following information:

(a) the name and address of each customer requesting a refund;

(b) the date that respondents receive each request for a refund; [102]

(c) if a refund has been granted, the amount of the refund and the date that it was sent to the customer;

(d) if a refund has been denied, a copy of the written request, the date a written explanation of the denial was sent to the customer and a copy of the written explanation.

Such records shall be maintained for a period of not less than three (3) years from the date that the customer sent in the request for a refund.

Respondents shall grant any duly authorized representative of the Federal Trade Commission, upon reasonable notice of time and place, access of all records that are required to be maintained under Part IV of this order, and shall furnish to the Federal Trade Commission any copies of such orders that are requested by any of its duly authorized representatives.

III.

It is further ordered, That the complaint be, and hereby is, dismissed as to respondent Juanita Anderson.

IV.

Compliance with the terms of this order in no way relieves respondents from the obligation to comply with all applicable statutes and Trade Regulation Rules of the Federal Trade Commission [103] pertaining to mail order sales, warranties or any other subject, whether or not related to this order. In the event that any such statute or Trade Regulation Rule imposes upon respondents contradictory, as opposed to additional or more stringent, duties, respondents may petition the Federal Trade Commission for a modification of this order or for an exemption from the pertinent Trade Regulation Rule.

It is further ordered, That respondents shall distribute a copy of this order to all operating divisions of Columbia Research Corporation and to present or future employees, agents or representatives of said corporation, and that respondents shall secure from each such individual a signed statement acknowledging receipt of said order.

It is further ordered, That, for a period of twenty (20) years following the effective date of this order, respondent Raymond Anderson and, for a period of ten (10) years following the effective date of this order, respondent Joseph Anderson shall, respectively, promptly notify the Commission of the discontinuance of his then current business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties, responsibilities and financial interest in connection with the business or [104]employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, Columbia Research Corporation, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondents herein shall within sixty (60) days and one (1) year following the effective date of service of the order, and at such other times as the Commission may require, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order. [1]

APPENDIX

ABBREVIATIONS

For purposes of this Initial Decision, the following abbreviations are used:

F.:	Finding
MDC:	Market Development Corporation
CRC:	Columbia Research Corporation
CX:	Commission's Exhibit
CPX:	Commission's Physical Exhibit
RX:	Respondents' Exhibit
Tr:	Transcript
CPF:	Complaint Counsel's Proposed Findings
RPF:	Respondents' Proposed Findings
CB:	Complaint Counsel's Brief In Support of Proposed Findings

CRC Sanctions:

Order Ruling Upon Complaint Counsel's Motion For Imposition of Sanctions, And For Partial Summary Decision Or, In The Alternative, To Certify To The Commission Complaint Counsel's Request That The Commission Seek Federal Court Enforcement Of The Subpoena Duces Tecum Served On Respondent Columbia Research Corporation, dated November 1, 1977.

Raymond Anderson Sanctions:

Order Ruling Upon Complaint Counsel's Motion For Imposition Of Sanctions, *And For Partial Summary Decision Or, In The Alternative, To Certify To The Commission Complaint Counsel's Request That The Commission Seek Federal Court Enforcement Of The Subpoena Ad Testificandum Served On Respondent Raymond Anderson,* dated November 1, 1977. [ii]

First CRC Admissions:

First Request for Admissions Directed to Respondent Columbia Research Corporation, dated June 7, 1977. *Answer,* August 15, 1977. Portions were deemed admitted by the Administrative Law Judge's *Ruling Upon Complaint Counsel's Motion To Determine Sufficiency Of Respondents' Columbia Research Corporation's And Raymond Anderson's Answers And Objections To The First Request For Admissions,* dated October 18, 1977.

Second CRC Admissions:

Second Request for Admissions Directed to Respondent Columbia Research Corporation, dated December 29, 1977. This *Request* was deemed admitted by oral order of the Administrative Law Judge on November 29, 1978. (Tr. 5411).

Third CRC Admissions:

Third Request for Admissions Directed to Respondent Columbia Research Corporation, dated January 23, 1978. This *Request* was deemed admitted by oral order of the Administrative Law Judge on November 29, 1978. (Tr. 5411).

Fourth CRC Admissions:

Fourth Request for Admissions Directed to Respondent Columbia Research Corporation, dated January 31, 1978. Answered in part, April 5, 1978; in part, June 22, 1978; and deemed admitted in part, November 29, 1978. (Tr. 5411).

Fifth CRC Admissions:

Fifth Request for Admissions Directed to Respondent Columbia Research Corporation, dated August 14, 1978. This request was deemed admitted by oral order of the Administrative Law Judge, November 29, 1978. (Tr. 5411). [iii]

Stipulation:

Stipulation as to testimony of thirty-nine (39) of respondents' consumer witnesses, filed October 30, 1978.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint in this matter was issued on December 19, 1975, and charged respondents with a variety of deceptive practices in connection with the mail order sale of vacation certificates and other merchandise. After more than two years of pre-trial proceedings, a trial was held before administrative law judge (ALJ) Thomas Howder, beginning on January 31, 1978. The trial consumed most of the year 1978, and generated a record in excess of 6000 pages of testimony and 1100 exhibits. The initial decision of the law judge was filed on June 7, 1979, [2]and was generally adverse to respondents.[1] Two respondents, Columbia Research Corporation and Raymond Anderson, have filed an appeal, arguing principally that various procedural infirmities in the conduct of the case necessitate dismissal of these proceedings. Our review of the appeal follows.

The Parties and the Challenged Practices

A. Market Development

Market Development Corp. (MDC) began operating in late 1969, and terminated operations in June, 1974, when it filed for bankruptcy, listing 90–93,000 unsecured creditors with claims of between $15 and $80. (I.D. 1, 313)[2] After first offering sewing machines through door to door sales, Market Development shifted to mail order selling. (I.D. 4) It would customarily advise recipients of its solicitations that they had been specially selected or were winners of a contest that entitled them to purchase for only $69.50 (later $79.50) a sewing machine alleged to retail regularly for $100 more. (I.D. 175) Although $69.50 or $79.50 was represented to be the "Total Cost" of the sewing machines (I.D. 233) they were shipped to the customer C.O.D. with a substantial shipping charge added (*e.g.*, $14.95)—a charge that sometimes exceeded the actual cost of shipment. (I.D. 234–5) Market Development also offered "Treasure Chests", promotional packets of samples of name brand products that it purchased for $1.60–$2.00 (I.D. 17) and advertised falsely as containing $30 or more worth of products. (I.D. 189) The Treasure Chests were often sold in connection with offers of free vacations. Typically, a customer would be contacted and advised that he or she had "won" a right to a free vacation, and the right to receive the Treasure Chest, for which he or she need only submit the sum of $15. (I.D. 110) [3]

Market Development encountered numerous delays in shipping its sewing machines and Treasure Chests, to the point that by January 1974, MDC required three to four months to ship the sewing machines after orders were received from the customers. Despite the substantial backlog, no effort was made to halt the receipt of incoming orders, or

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[1] By consent of the parties, however, respondent Juanita Anderson was dropped from the complaint.

[2] The following abbreviations will be used in this opinion:

I.D. - Initial Decision, Finding No.
I.D. p. - Initial Decision, Page No.
Tr. - Transcript of Testimony (Page No.)
CX - Complaint Counsel's Exhibit No.
RX - Respondents' Exhibit No.
CPX - Complaint Counsel's Physical Exhibit No.
TROA - Transcript of Oral Argument Before the Commission

to refrain from cashing incoming checks, with the result, as noted above, that by the time of its bankruptcy Market Development listed itself as having 90–93,000 unsecured creditors, mostly consumers, with claims of between $15 and $80 each. (I.D. 237–253)

B. Columbia Research Corporation

Soon after Market Development's bankruptcy, Columbia Research Corporation (CRC), commenced operation. (I.D. 19–20), under the control and direction of the same individual, Raymond Anderson, who had run MDC. (I.D. 45, 295–330) CRC offers vacation certificates, "Gift Cartons", blackjack boots, and memberships in a buying club. (I.D. 21) Of principal concern are the vacation certificates.

As with MDC, the consumer typically receives a mailing advising that he or she has "won" (I.D. 107–8), or been specially selected to receive (I.D. 112) a "free" vacation (I.D. 120) in Miami or Las Vegas, essentially consisting of two or three nights lodging at a hotel or motel, and a package of benefits (in Las Vegas, for example, a "gaming package") touted as being worth a large amount of money (although comparable packages were available for free to any visitor to Las Vegas, I.D. 224). To qualify for this apparent windfall, the consumer need only remit within 10 days (lest the opportunity no longer be available) a "registration, handling, and service" charge of $15.00 or $15.95. (I.D. 121)[3] According to the Order Form that accompanied many of its solicitations, the $15.00 payment was subject to a "Money-Back" guarantee. (I.D. 277) Careful reading of the text of the solicitation letter, however, would reveal that the Money-Back guarantee was conditioned upon the "winner" first taking his or her "free" trip, (I.D. 276) an occurrence that subsequent events might render highly inconvenient if not impossible.

What happens *after* the consumer remits money to CRC is really what determines whether he or she is a winner—or a victim. Typically the consumer receives back from CRC information pertinent to the consumer's choice of vacation site, and is directed to make arrangements for an arrival date either via CRC or through Genie Vacations in Las Vegas or Miami-Las Vegas Vacation Bureau. (I.D. 29–30) At this point the consumer also begins to learn that there is less to the "free" vacation than meets the eye. Additional charges or [4]conditions may be revealed, for example, an allegedly refundable deposit of $10 to $25 to ensure the customer's arrival; (I.D. 123)[4], an extra charge of $5.00

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[3] Record evidence indicates that in fact orders would be accepted even after 10 days. (CX 1015F) *See also* pp. 20–21 *infra*.

[4] The deposits were sometimes not refunded, or refunded only after considerable exertion by the consumer. (I.D. 125)

per night for reasons ascribed variously to "tax", "peak season", or "extra charge", (I.D. 126); an extra charge for weekend arrivals (I.D 126); or the unavailability of any rooms on weekends and hence, the impossibility of a weekend vacation. (I.D. 147) Receipt of the gaming package also reveals it to be something less than advertised; realization of the hundreds of dollars of benefits is contingent upon one's compliance with a variety of highly restrictive conditions. (I.D. 211-226) More knowledgeable customers sometimes recognized upon receiving these gaming packets that they are similar to those routinely given away to any visitor to Las Vegas. (I.D. 224) In general, realization of the benefits promised usually requires substantial expenditures of one's own funds, (I.D. 221) and the passage of long periods of time in a casino. (I.D. 217-18; 220; 223)

The foregoing affirmative misrepresentations and misleading failures to disclose important facts, as well as numerous other deceptions recounted in the initial decision, have an obvious capacity to mislead individuals into remitting $15.00 or $15.95 on the assumption they are to receive something more than they actually do. Subsequent revelation of the conditions, not surprisingly, induces some consumers to conclude that they no longer desire to avail themselves of their "free" vacation. However, because CRC's "money back guarantee" is contingent upon the consumer's first taking the proferred vacation, these consumers are frequently unable to secure refunds, and simply forfeit the $15.00 or $15.95. (I.D. 281)

Those consumers not deterred by the discovery of additional conditions may try to reserve accommodations for given nights. Many encounter considerable difficulty in this regard, both because it is usually not possible to use the vacation certificates on weekends, and because of repeated lack of vacancies on week nights. (I.D. 148) This occurrence is hardly surprising in view of record evidence indicating that CRC sold vacation certificates to far more "winners" than it could possibly accommodate at their desired locations. (I.D. 258)[5] Once [5] again, however, efforts to obtain refunds in these circumstances are met with the argument that the trip must be taken for the guarantee to apply, even though it is frequently by virtue of CRC's own failure to have available sufficient accommodations at the time they are desired that the customer is unable to take the vacation for which he or she has paid. (I.D. 257, 259, 260)

Those consumers undeterred by the additional conditions and able to obtain reservations at an acceptable time do take their "free" vacation.

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[5] The record reveals that CRC collected money for Las Vegas vacations from more than 200,000 customers who were required to take the trip during a period of time in which CRC was able to accommodate fewer than 50,000 customers. (I.D. 258)

Some of these consumers upon taking the trip discover further departures from what they have been led to believe would occur. For example: (1) accommodations differ from those selected by, and promised to the consumer, and previously undisclosed charges are sometimes made (I.D. 150); (2) some accommodations advertised as being on the Las Vegas "strip" are in fact at some remove from it (I.D. 155–157); (3) accommodations advertised as "First Class", "First Class Deluxe", and the like are not as described (I.D. 158); (4) consumers have been subjected to high pressure sales pitches for land sales operations or time-sharing condominiums connected to certain of the vacation programs sold by CRC. That fact was not disclosed in its solicitations (despite its obvious materiality to the willingness of some consumers to accept the package) and in some solicitations it was even stated falsely that no land sales promotions were involved. (I.D. 230–232) The foregoing occurrences result, predictably, in considerable dissatisfaction by some consumers with their "free" vacations. Even some of these consumers, however, have had difficulty obtaining refunds or have not received them at all. (I.D. 282)

Finally, of course, there are those consumers who take the trip, and find themselves satisfied. These, as we say, are the real "winners".[6] Unfortunately, their numbers are considerably less then those scores of thousands to whom the term is indiscriminately applied by CRC in its mass mailings.

The foregoing describes, in brief outline only, the misrepresentations alleged by the complaint and found by the ALJ. Others are detailed at length in the 104 page initial decision. Some of the misrepresentations, or deceptive failures to disclose material facts, are obviously of major consequence. Others, standing alone, are of less significance, but in *combination* they help create the misleading impression that CRC's $15.00 or $15.95 vacation is considerably more than it really is. [6]

In their appeal, respondents have dealt sparingly with the specific allegations of the complaint, and the specific misrepresentations found by the ALJ. They do, however, deal generally with them, alleging that the ALJ looked at specific representations in "isolation" rather than in total context, and that since CRC "substantially delivered the items which it said it would" (Respondents' Brief at 15) its advertising cannot be considered deceptive.

This contention (which comes unaccompanied by any reference to those specific findings of violation which it is alleged to refute) cannot be accepted. That some consumers were satisfied by what CRC furnished them proves only that for *some* people the misleading statements and failures to reveal certain facts proved immaterial. For many others, however, the evidence is clear that CRC's solicitations were misleading in a highly material way.[7] The Commission, of course, may infer materiality having first found an untruthful claim, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965). This case hardly requires such an exercise of our expertise, however, for the record reveals numerous witnesses who testified to having been deceived in material fashion by express statements and the omission of various facts in CRC's solicitations.

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[6] The parties stipulated that 89 witnesses to be called by respondents would have testified that they were not misled by CRC's solicitations and that they were satisfied with what they received in return for their money. (Stipulation, Filed 10/30/78, pp. 1–8)

By way of illustration, according to the testimony of one witness who paid her $15.95, and later found herself unable and unwilling to take advantage of a Las Vegas vacation after discovering that she was required to give 45 days notice of plans, make a $25.00 deposit, and stay in the sponsoring casino for six hours at a time in order to avail herself of each "free" meal advertised in the initial solicitation: [7]

Q. In conjunction with the 45-day notice [and the $25 deposit] would you have purchased the package?

A. No.

Q. Had you known the mechanics of how the gambling package worked would you have purchased the package?

A. No.

Q. If you had understood in advance how the meal allowance program was to work would you have purchased the package?

A. No, I really didn't understand it any way.

Q. But had you known you received only one meal in six hours [one meal for staying in the casino for six hours] would you have purchased the package?

A. No, definitely not. (Williamson, Tr. 126)

Another witness, more familiar with the range of competing vacation opportunities in Las Vegas, testified as follows:

Q. Please think back, Mr. Janov, to when you received your original solicitation. At that time if you had known you were going to be asked to put down a $25 deposit, would you have sent in your $15?

A. If I had been asked—if I had known that I would have to send another $25 deposit, I would not have given it any consideration at all because for $40 at that time, you can get all the accommodations you want without going through this. (Janov, Tr. 296)

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[7] As the Seventh Circuit Court of Appeals has observed:

> The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them. *Basic Books, Inc.* v. *FTC*, 276 F.2d 718, 721 (7th Cir. 1960).

A third witness who took the trip and discovered upon arrival that she was required to pay an extra $5 per night per person, for the two night stay, testified as follows: [8]

Q. Would you have sent in your $15.95 if you had known that you would be charged an additional $20.00 for the room?

A. No, I would not.

Q. Would you have sent in your $15.95 if you had known what you were getting in the way of the gaming package?

A. No. (Bratschi, Tr. 658)

A fourth witness, Ms. Blackmore, testified that after remitting her $15.95 and making the $25 deposit subsequently requested, she received reservations on the night of her choice for the Colonial House. (Tr. 692–3) Upon arrival, she and her husband were advised that the Colonial House would not accept them; after some wait they were taken to the "Mini Price Motor Inn" where, after paying an additional charge of $10.00 per night, they were allowed to occupy a room with a posted rate of $12.99 per night. (Tr. 694) The witness further described various efforts to avail herself of the gaming package provided by CRC (Tr. 696–700); and the subsequent discovery that similar or identical packages were routinely available for free to any visitor to Las Vegas. (Tr. 710–711; CPX 2–3) The witness noted that upon returning from her trip, she requested a refund from CRC, but received neither the $20.00 extra charged by the hotel, nor the $15.95 charged originally by CRC. (Tr. 704) She did, however, subsequently receive three additional solicitations from CRC urging her to take advantage of their vacation packages. (Tr. 704)

While it is not possible to quantify the consumer injury and abuse wrought by respondents (and such is not necessary for a finding that Section 5 has been violated) it is apparent that the scores of consumers who testified in this proceeding are but the tip of an iceberg. Below them, one finds the 3847 consumers who, as of February 2, 1978, had written to the Federal Trade Commission to complain either of non-delivery of merchandise by CRC, or of failure to honor its guarantees. (CX 2067) These 3847 consumers, in turn, pale in comparison with the more than 200,000 consumers who paid for Las Vegas vacations that they were required to take during a period of time in which the record reveals that CRC was capable of accommodating [9]no more than 50,000 customers.[8] (p. 4 *supra*) The foregoing figures are cited not because they are necessary to findings of violations of Section 5, but because in combination with record testimony of misrepresentations, they serve to furnish some notion of the magnitude of injury involved in this case.

A further substantive argument raised by respondents is that they are not responsible for certain of the more egregious failures to perform recounted in the record because these resulted from breaches of contract by third parties engaged by CRC to help effectuate the promises made in its solicitations. As a purely legal matter we do not find this position acceptable, nor, under the circumstances of this case, is the legal result an inequitable one.

The law judge in finding liability on CRC's part for certain actions of the Miami—Las Vegas Vacation Bureau (MLV) cited cases such as *Goodman* v. *FTC*, 244 F.2d 584 (9th Cir. 1957) and *Standard Distributors, Inc.* v. *FTC*, 211 F.2d 7 (2d Cir. 1954) in which corporations and individuals were held liable for misrepresentations made by sales personnel alleged to be "independent contractors" by the respondents, but found to be "agents" by the Commission and reviewing courts. While respondents seek to distinguish their situation from those of *Goodman* and *Standard Distributors*, we think in fact that the argument for liability is stronger here. This is because there is here no question but that the challenged misrepresentations were made by the respondents themselves. Having made [10]certain representations to consumers, in or affecting commerce, respondents are liable for the truth of their claims. They cannot, unbeknownst to their customers, delegate responsibility for making their claims come true, and rely upon such delegation as a defense to a charge of committing deceptive acts or practices. CRC benefited from its untruthful statements, to the tune of receiving $15 or $15.95 from hundreds of thousands of customers. It cannot thereafter disclaim responsibility for whether or not those statements were true on grounds that it had contracted with others to ensure their accuracy.

To be sure, were this a case presenting isolated instances of representations rendered untrue by the contractual breaches of third parties, in which the respondent had made immediate efforts to make its customers whole for the injury they had suffered, and had taken immediate steps to terminate the contractual relationship, the public interest in pursuing the breach of Section 5 might be nil. This case, however, presents no such circumstances.

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[8] Respondents have assigned as error the ALJ's conclusion with respect to the number of CRC's customers during a given time period, arguing that it is based upon computer tapes, which constitute unauthenticated hearsay evidence, and which were interpreted by a witness unqualified to do so. For the numerous reasons noted by complaint counsel in their Answer Brief, to which respondents have made no Reply (although permitted by rule to do so), the Commission finds this challenge to the ALJ's conclusion unpersuasive. Witness Morelli was clearly qualified by virtue of 7-1/2 years' experience as a systems analyst, programmer analyst, or programmer, and related training, to testify with reference to the issues he was called to resolve. The tapes themselves were properly admitted, if not as admissions by the respondents, then as business records. And, the tapes were suitably authenticated by other record evidence so as to warrant the conclusion of the witness as to what they showed.

In the first place, it is apparent even from the contract signed between CRC and MLV that CRC should have had reason to anticipate at least some of those precise actions that it blames for rendering its mass mailings deceptive. For example, the contract between CRC and MLV specifies that "there will be certain times during the year when the cost to the user may increase" and further that "there will be certain times during the year when certificates will not be honored." (CX 1089–B,C) It should, therefore, have come as no surprise to anyone except the customers of CRC (who were led to believe they were getting a no-strings-attached vacation for their initial payment) when it transpired that MLV added extra charges and restricted availability to the point that many people were unable, or, with good reason no longer willing, to avail themselves of its services.[9] [11]

Moreover, the evidence suggests that whatever CRC's fore-knowledge as to MLV's behavior may have been, once CRC became aware of the behavior of its contract partner it (1) failed to make whole customers injured thereby [for example, by refunding their money and refunding unauthorized and disclosed extra charges and then seeking reimbursement from MLV (I.D. 281–282)];[10] and (2) continued to solicit purchases and utilize the services of MLV (*e.g.*, Rees, Tr. 392–395; CX 127, 129; Horton, Tr. 1088–1093; CX 1797; Cain, Tr. 870–872; Gorman, Tr. 188–190; CX–35(b), (c); Lawley, Tr. 460–462; CX 1765–6; Bryan, Tr. 1134–1142; CX 255–260; Heller, Tr. 1568–1570; CX 50, 52; Bornstein, Tr. 1317–18) despite having been informed of the alleged breaches of contract. (*e.g.*, CX 177A, Tr. 791–92) Under these circumstances, it is plainly in the public interest that CRC be held liable for the deceptive acts and practices in which it has engaged.[11] [12]

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[9] While CRC's contract with MLV specified that MLV would notify CRC before imposing additional charges or other restrictions, it is not at all clear how such notice was designed to assist consumers who were induced to send in $15.00 or $15.95 on the assumption that they would receive in return a no-strings-attached right to a vacation good for one year. What, for example, was expected to become of the consumer who paid his or her money in August, anticipating a vacation in January, if MLV gave notice in September that it was changing its terms? The consumer was induced to pay the money without disclosure of added charges or restrictions, even though CRC's contract with MLV contemplated that such charges or restrictions might subsequently be imposed.

[10] CRC did make certain efforts to contact at least some consumers who were injured by virtue of the actions of MLV, but its efforts appear generally to have been confined to the furnishing of extra gaming coupons or extensions of time in which to take vacations that many customers were understandably unwilling to accept as a result of the trouble they had already encountered.

[11] Moreover, the proffered defense, even if accepted, would excuse only a fraction of the violations found, and is not asserted as to the actions of some of CRC's booking agents, such as Genie Vacations.

Procedural Objections

As noted before, respondents' principal objections to the outcome of this case derive from alleged procedural deficiencies in the conduct of their trial, which, in respondents' view, mandate dismissal of all charges. We shall consider these alleged errors below:

A. Alleged Constructive Exclusion of Defendant Raymond Anderson from Presence at His Trial

Respondent Anderson urges that he has been denied Due Process of Law because he was constructively precluded from attending at least certain segments of the trial. The argument is primarily raised with respect to those portions of the case-in-chief heard in California, where Mr. Anderson had been the subject of a state criminal indictment, and was subject to arrest if he appeared.

Some recitation of the facts surrounding this claim is needed in order to place it in proper perspective. In March, 1977, the Superior Court of California for the County of San Francisco docketed the case of *People v. Columbia Research Corporation*, Docket No. 38988. Thereafter, proceedings were begun to extradite defendant Raymond Anderson from Illinois.[12]

On April 29, 1977, Complaint Counsel filed a "Motion to Set Initial Trial Date and Location", requesting that the initial hearing be scheduled for July 18, 1977, in Los Angeles, California, on grounds that all of complaint counsel's intended initial witnesses were located in Southern California.

On May 23, 1977, respondents Raymond Anderson and Columbia Research Corporation filed a motion to stay pending discovery requests and to stay the initial hearing in the case *until the criminal action was resolved*. No reference was made in this motion to the alleged inconvenience of complaint counsel's proposed Los Angeles trial site.

By order of June 30, 1977, Judge Howder denied the request of respondents for a stay pending completion of the criminal trial, noting that no prejudice would be created by simultaneous proceedings. Thus, as of June 30, 1977, respondents were on notice that the judge would not stay the proceedings pending resolution of either Mr. Anderson's extradition fight, or an eventual criminal trial. [13]

Following efforts by complaint counsel to obtain pretrial discovery, of which more shall be said later, complaint counsel by letter dated November 14, 1977, proposed a pre-trial and beginning-of-trial schedule, including a renewal of their request of April 29, 1979, that the first hearing be held in Los Angeles, California. By order of November 17, 1977, Judge Howder ordered commencement of initial hearings in the case in Los Angeles, California on January 31, 1978, with the exact location to be established later. (Order Respecting Remaining Pretrial Procedures and Scheduling Commencement of Hearings) By order of December 7, Judge Howder established the site in Los Angeles at which the first set of hearings would be held. (Order Scheduling Commencement of Hearings)

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[12] According to respondents' counsel, no decision as to Mr. Anderson's extradition from Illinois had been reached as of November 5, 1979. (TROA, p. 10)

Still no objection was heard from respondents. Finally, on January 20, 1978, twelve days before the Los Angeles hearings were set to begin, respondents communicated their constitutional objection to the Los Angeles trial site.[13] [14]

Under these circumstances, the reaction of Judge Howder is not surprising. By order dated January 26, 1978, he denied the request for a change in the location of hearings, noting:

> The complaint in this case issued over two years ago, on December 19, 1975. As I have previously ruled, respondent Anderson has been completely recalcitrant throughout the entire course of discovery, resulting in much delay in this proceeding. The initial hearings were scheduled on December 7, 1977. I feel Mr. Anderson's request for a change in this schedule, coming at so late a date, is unwarranted. [Order Denying Request for Change in Location of Hearings, p. 1]

As complaint counsel observe, rescheduling of the hearings as requested by respondents would have entailed considerable delay and disruption in already protracted proceedings. It should be noted in this regard that respondents' request was not merely that the proceedings be held elsewhere than in California, but that they be held *only* in Illinois, the one state in which Mr. Anderson was apparently subject to the least unfavorable legal consequences. (TROA p. 9; Tr. 1773) Illinois however, was the one state in which Mr. Anderson made no mail solicitations, and so was the one state in which no complaining witnesses were to be found. To conduct complaint counsel's entire case-in-chief in Illinois would, therefore, have caused maximum cost to the government (for transporting, housing, and feeding witnesses) and maximum disruption to consumer witnesses.

Though we are not entirely certain from respondents' brief which provision of law they claim was breached by conduct of the hearings in Los Angeles, we must presume it to be the Fifth Amendment's guarantee of due process. The Sixth Amendment's explicit guarantees apply only in criminal cases *Bell* v. *Burson*, 402 U.S. 535, 540 (1971) and even there, may be waived by consent or conduct. *Illinois* v. *Allen*, 397 U.S. 337, 342, *reh. den.* 398 U.S. 915 (1970). The Administrative Procedure Act confers on a party only the right "to appear in person *or by* or with *counsel* or other duly qualified representative in an agency proceeding." 5 U.S.C. 555(b)(1976) (emphasis added.) There is no doubt that Mr. Anderson has been ably represented by counsel in this case. Finally, the Commission's Rules of Practice, 16 CFR 3.41(c) to which respondents refer, do no more than confer "all . . . rights essential to a fair hearing." This provision does not refer specifically to a party's right to attend a hearing and should not be construed to enlarge upon or derogate from the guarantees of the APA. [15]

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[13] Respondents contend that they planned to tender their objection to the Los Angeles trial site at a pre-hearing conference scheduled for Cleveland on January 7, 1978. This conference was cancelled because of a major snowstorm that prevented the ALJ and respondents' counsel from attending. (TROA 7; Order Cancelling Prehearing Conference dated January 10, 1978) The record reflects no reason as to why respondents chose to wait until January, 1978, to present their objection to the Los Angeles trial site when they were on notice at least since November 17, 1977 (if not since April, 1977) that Los Angeles would be chosen. While respondents did file on December 8, 1977 a motion for continuance of the January 31, 1978, hearing date (which Judge Howder denied on January 12, 1978), the pendency of that motion can hardly excuse the failure to raise other objections to the trial order. By raising their objections *seriatim*, respondents all but ensured that their objection to the trial location would not be entertained until such time as a change in trial locations would be rendered extremely inconvenient and expensive to the government. Whatever the purpose of this method of proceeding, its obvious effect was to invite delay, and it cannot be condoned.

This leaves the Fifth Amendment's guarantee of due process. As the Supreme Court has instructed, "'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). It is a flexible concept that "calls for such procedural protections as the particular situation demands," *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), and accordingly, the requirements of due process in a particular case depend upon a balance of the private and public interests involved. *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976).

The application of these broad general principles to the specific issue involved here does not appear to have arisen very often, and neither side has pointed out, nor have we been able to discover, a single case that remotely suggests that a respondent's physical presence at an administrative hearing is a linchpin of due process. The case on which respondents chiefly rely, *Jeffries* v. *Olesen*, 121 F. Supp. 463 (S.D. Cal. 1954), was technically not even resolved on due process grounds, but rather by interpretation of regulations promulgated by the Postmaster General. 121 F. Supp. at 474ff. The case, however, has heavy overtones of due process, and is illustrative of the balancing of interests required to determine a claim such as that made by respondent Anderson. In *Jeffries* the court held that an administrative determination of postal fraud was invalid for failure to transfer an administrative hearing to Los Angeles, where the defendant and his lawyer were located.

In *Jeffries*, a hearing on charges was set only 22 days after issuance of the complaint, and only 19 days after notice of hearing was served upon the administrative respondent. Promptly filed motions for transfer of the hearings from Washington to Los Angeles were denied, and the trial was held in Washington, D.C. only 36 days after issuance of the complaint. The refusal to transfer precluded the impoverished defendant, whose wife was ill with polio at the time, from attending in person *or by attorney*, and the refusal to transfer the hearings precluded the administrative defendant's attorney from cross-examining scientific witnesses for the government, a fact that the judge apparently considered to have been of some possible relevance to the outcome of the case. 121 F.Supp. at 474–76. [16]

The court in *Jeffries* construed a Postal Service regulation requiring that motions to transfer the site of hearings be resolved with "due regard" for the "convenience and necessity" of the parties. As the court observed,

> "Due regard" like "fairness" is a term of varying content. What is "fair" in one situation may be grossly unfair in another; determination must be made in the light of reason and common sense and the circumstances of the case. 121 F. Supp. at 475.

So must it be here. The balance that weighed so heavily for the respondent in *Jeffries* tilts markedly the other way in this case. Mr. Anderson's request for transfer was raised at the last possible moment, long after it could have been made, and at a time when it was certain to cause maximum inconvenience and expense for other parties involved.[14] Respondent's difficulty in coming to California, moreover, in no way foreclosed the presence of his counsel, who did attend all hearings and cross-examined witnesses vigorously.

Moreover, respondents have not pointed to a single example of the manner in which Mr. Anderson's physical absence from the site of some hearings resulted in less effective presentation of his case. Nothing precluded Mr. Anderson from reviewing transcripts of the testimony elicited at hearings outside Illinois, and had there been lines of questioning that he could have suggested to his counsel had he been in attendance, their timely mention might have permitted at least the selective re-examination of certain witnesses. Respondents, however, have at no time indicated any respect in which Mr. Anderson's physical absence from the hearing room in any way may have rendered his counsel's interrogation of witnesses less effective. Nor is this at all surprising given that the testimony elicited was drawn largely from consumers testifying as to their own experiences in trying to take advantage of the vacation opportunities they had purchased from CRC. Most of this experience would [17]have been outside the scope of Mr. Anderson's own observation.[15] While certain rights are so fundamental as to require no showing of possible injury for their assertion, the realistic possibility of prejudice is clearly an important factor to be considered where the existence of a right depends upon a balance of competing interests. *Arthur Murray Studio of Wash. Inc.* v. *FTC*, 458 F.2d 622, 624 (5th Cir. 1972).[16]

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[14] We believe that on these grounds alone, the claim may be considered to have been waived, although even had it been presented in more timely fashion, we believe that the other factors listed here would have necessitated its denial.

[15] Respondent did file a motion, dated October 2, 1978, six months after the end of complaint counsel's case, in which they asked for the recall of *all* of complaint counsel's witnesses for further cross-examination. No indication was

(Continued)

Finally, it must be observed that a principal reason why so many consumer witnesses have been called in this case (thereby rendering it extremely impracticable to hold the case-in-chief entirely in Illinois) is that respondents have adamantly refused to respond to discovery orders issued by the administrative law judge. Revelation of corporate documents by CRC, or the willingness of respondent Raymond Anderson to be deposed as ordered, might well have diminished the number of witnesses called. [18]

Under the foregoing circumstances, we believe that the administrative law judge acted properly in refusing to transfer the site of all trial proceedings to Illinois.[17]

Nor did reversible error result from the failure of complaint counsel to provide respondents with a "telephonic hook-up" whereby Mr. Anderson would have been able to hear the proceedings live from his sanctuary in Illinois. The record reveals that after the request for a hook-up was made on the first day of trial, its possibility was explored and it was determined that the Federal Trade Commission lacked the facilities to provide one. Complaint counsel took the position that the Commission should not be obliged to pay the cost for a hook-up through a private telephone company. Thereupon, Judge Howder invited counsel for respondent to forward·his request to the full Commission (Tr. 531), but the request was not pursued. Respondent

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given as to what questions might have been asked of these witnesses that had not previously been asked. At an oral hearing on the motion, counsel for respondents indicated that he might be satisfied with recall of only 15–20 witnesses (Tr. 5413), but still gave no indication of what questions might be asked of these witnesses, why such questions could not have been asked earlier, or why an employee of CRC other than Mr. Anderson could not have been present at the hearings to assist counsel in the formulation of those undisclosed questions that it was deemed necessary to ask. Under these circumstances, we believe that Judge Howder properly denied the request for a further round of cross-examination.

[16] It is also noteworthy that respondents offered to conduct their own defense hearings in Los Angeles and numerous other locations in which they contend it was or would have been impermissible for complaint counsel to present their side of the case. [The necessity for those hearings was obviated when both sides stipulated to what respondents' consumer witnesses would have said.] It should also be observed that the record reflects that complaint counsel were interviewing witnesses in California (in obvious anticipation of Los Angeles hearings) long before Mr. Anderson's indictment. No suggestion is made, nor could one be, that the choice of hearing sites by complaint counsel was made for any purpose other than convenience of the witnesses.

[17] We should note, incidentally, that the foregoing analysis assumes, without deciding, a central premise of respondents' position, namely that the decision of Judge Howder to hold hearings in states other than Illinois amounted, in a legal sense, to "exclusion" of Mr. Anderson from personal attendance at such hearings. This premise seems, at the least, questionable. Mr. Anderson was not physically excluded from the courtroom, or otherwise physically prevented from attending by reason of financial hardship, illness, or other disadvantage. Rather, the complained-of "exclusion" occurred simply because Mr. Anderson preferred not to enter any state other than Illinois, including the state in which one of the hearings was held. The alleged violation of due process consists, ironically, in the scheduling of a federal trial in such a way as to condition the respondent's attendance at hearings upon the respondent's submission to the due process of a state.

relies for support upon language in Justice Brennan's concurring opinion in *Illinois* v. *Allen, supra*, 397 U.S. at 347. Justice Brennan suggested in his concurrence that a trial judge who has excluded a contumacious criminal defendant should attempt to mitigate the effect of the exclusion to the extent that to do so is technologically feasible. 397 U.S. at 351. We do not believe that the Justice's suggestion can be taken as authority for the necessity of a telephonic hook-up in this civil proceeding. [19]

B. Use of Sanctions for Failure to Comply with Discovery Orders

Respondents also assign as error the ALJ's imposition of sanctions upon respondents for their refusal to comply with discovery orders. There is no question that the sanctions were imposed in a fashion consistent with the provisions of §3.38 of the Commission's Rules of Practice, 16 CFR 3.38, but respondents argue that the rule as applied exceeds the Commission's lawful authority.

Sanctions were entered by Judge Howder following the refusal of respondents CRC and Raymond Anderson to respond to discovery orders served upon them, and following denial by Judge Howder of various motions to quash these discovery orders. Respondent CRC refused to respond to a subpoena *duces tecum* issued by Judge Howder on February 3, 1977, while Mr. Anderson refused to respond to a subpoena *ad testificandum* served on November 2, 1976. Thereafter, Judge Howder ordered that by virtue of the refusals to testify, certain of the complaint allegations would be taken as proved against respondents CRC and Raymond Anderson. Respondent Anderson was forbidden to testify in his defense, and both parties were precluded from entering into the record documents that would have been responsive to the dishonored subpoenas. Complaint counsel were also accorded the right to introduce secondary evidence without objection to show facts that the withheld documents would have shown.[18]

As with their other procedural objections, respondents have not suggested how, in particular, they have been prejudiced by the sanctions, in light of the very extensive trial that was ultimately conducted. Respondents' position appears to be that the entire proceeding must be dismissed, even though it is evident that most of the charges of the complaint were found by Judge Howder to be sustained by competent evidence adduced by complaint counsel, and without necessity for resort to the sanctions. [20]

Complaint counsel for their part, contend that every order provision, save one, may be justified on the basis of record evidence of deceptive practices, without need to resort to the sanctions.[19] Our own review of the record reveals that, in fact, *all* order provisions are warranted by testimonial and/or documentary evidence of law violations, and, accordingly, the issue of the sanctions is moot.

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[18] It was pursuant to this grant that letters from 3847 complaining consumers were introduced.

The one order paragraph that complaint counsel aver depends for its validity upon the sanctions is Paragraph I(6) which forbids representations that consumers have only a limited time to respond to offers if in fact the stated time limit is fictitious. This paragraph derives from the complaint allegation that MDC and CRC misrepresented to consumers that they must remit their money within 10 days in order to take advantage of various offers. Misrepresenting that an offer extends for a limited time only is a standard way of misleadingly enhancing the value of the offer in the consumer's mind, and thereby inducing its acceptance. [21]

While the ALJ found the evidence insufficient, absent resort to the sanctions, to justify a conclusion that the 10 day limit was not bona fide, our review of the record suggests the contrary. In responding to a California state official who inquired as to the validity of the 10 day period in 1975, Columbia Research Corporation wrote:

> The offer may be accepted after the 10 day period if we can still accommodate those persons sending in their acceptances. CX 1015F.

In fact, however, it is evident from the record that Columbia Research Corporation showed little regard for whether the number of people it solicited, and the number who sent in their $15, corresponded in any way to the number of people who could be accommodated over the course of the ensuing year (p. 4 *supra*) and the logical inference is, therefore, that the condition stated in CRC's response to the California official constituted no meaningful restraint upon its readiness to accept money remitted after the 10 day deadline. This inference is supported by the experience of Professor Walter Gellhorn, whose testimony revealed that his check was accepted weeks after the alleged 10-day deadline. (Tr. 2818–2825) Professor Gellhorn subsequently found that he could not obtain accommodations at the time and place promised, and after a lengthy series of correspondence with various governmental agencies received a refund. (Tr. 2827 ff.)[20]

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[19] The distinction between violations charged, and order provisions entered should be noted. The complaint alleged approximately 30 separate deceptive practices. The order contains a far smaller number of prohibitory paragraphs, some of which are cast to prevent recurrence of several of the violations charged in the complaint and found by Judge Howder. Thus, an order provision may be independently supported by several separate findings of violation. To illustrate, Paragraph I(8) of the Order proscribes a variety of misrepresentations regarding the retail price and value of items sold by CRC. This provision is fully justified on the basis of Judge Howder's findings as to misrepresentations of the retail value of the Treasure Chests and Gift Cartons distributed by MDC and CRC. (I.D. 18-204) This provision is also justified on the basis of Judge Howder's finding that the regular retail price of MDC's sewing machines was misrepresented to be $100 more than the price at which MDC offered the sewing machine. Judge Howder's finding that the retail price of the sewing machines was misrepresented depends in part upon reliance on the sanctions. (I.D. 175-79) His finding that the retail price and value of the Treasure Chests and Gift Cartons was misrepresented is fully supported by record evidence exclusive of the sanctions.

While we believe that this finding as to the falsity of the 10-day provision in respondents' solicitations is adequately supported by other evidence,[21] the sanctions drawn by the administrative law judge do lend support in an entirely permissible way to this conclusion. Respondents themselves were obviously the parties best situated to shed light on the truth of the charge. If it was their policy to return, uncashed, checks received after the 10 day period, only they could have so specified. Their failure to respond to discovery requests bearing [22] upon the bona fides of the 10 day enrollment period invites the inference that the withheld response would have confirmed that the 10 day period was a sham.

The drawing of an adverse inference from the unjustified failure of a party in litigation to respond to a valid discovery request has been recognized to be an entirely proper and indeed necessary exercise of an administrative agency's adjudicative responsibilities. *International Union (UAW)* v. *N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972); *N.L.R.B.* v. *Ship Shape Maintenance Co.*, 474 F.2d 434, 448 (D.C. Cir. 1972), drawn by analogy from both common law procedures, *e.g.*, *Armory* v. *Delamirie*, Str. 505 (K.B. 1722); 2 J. Wigmore, *Evidence* §285 (3d ed. 1940) and the Federal Rules of Civil Procedure [Fed. R. Civ. P. 37(b)(2)(A)]. Without such a capability, the express Congressional grant of adjudicative authority to an administrative agency would be profoundly frustrated. *International Union (UAW)* v. *N.L.R.B.*, *supra*, 459 F.2d at 1338–39.

Respondents argue that the application of sanctions amounts to an impermissible effort to enforce agency process without resort to the courts. Since the Commission's organic statute prescribes that the enforcement of a subpoena must be undertaken in Federal District Court, respondents argue that efforts to attach sanctions for a party's refusal to comply with a subpoena in effect amount to extrajudicial enforcement of the subpoena.

With this argument we cannot agree.[22] The drawing of adverse inferences or conclusions from a party's refusal to comply with adjudicative discovery demands does not amount to enforcement of a subpoena, but rather compensates the moving party for its adversary's failure to comply with a subpoena, and, thereby, maintains the integrity of the administrative process. A party that resists discovery demands justifiably is not properly liable to sanction, and may ultimately obtain review of the legitimacy of its refusal to comply if sanctions are imposed and a final order is based upon them. [23]

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[20] This occurrence is also prevalent throughout the record. Of those witnesses who had received refunds, many obtained them only after a lengthy train of correspondence and intervention by various governmental agencies and better business bureaus.

[21] It should also be noted that the District Court of Minnesota in a proceeding involving Market Development also concluded that its 10 day deadline was fictitious. CX 725–F.

[22] Nor, we should observe, could the Court of Appeals in *International Union (UAW)* v. *N.L.R.B.*, *supra*, which affirmed the NLRB's ability to impose sanctions notwithstanding that the Board, like the Commission, must enforce its subpoenas in court. 459 F.2d at 1338–39, 1343–44. *See also* *Association of National Advertisers* v. *FTC*, CCH 1979-2 Trade Cas. ¶62960 at 79406 (D.C. Cir. 1979) (Wright, J. concurring).

As the Commission has recently observed:

> Application of the adverse inference rule may only be made when the party's failure to produce documentary or other evidence is not adequately explained. *Elvis Mfg. Co.* v. *FTC*, 287 F.2d 831, 847 (9th Cir. 1961); *cert. denied*, 368 U.S. 824 (1961). Thus, the adverse inference rule makes the conduct of the person withholding the material an evidentiary fact in and of itself. The resulting inference may be strong or weak, depending upon the person's conduct and the surrounding circumstances. *See* 2 J. Wigmore, *Evidence* §285 (3d ed. 1940); *McCormick's Handbook of the Law of Evidence* §272 at 659 (2d ed. 1972). For example, an inference drawn against a respondent offering a weak explanation for its refusal to produce relevant evidence will be stronger than an inference drawn against a respondent providing a more plausible explanation. *American Medical Association*, Docket No. 9064, slip op. p. 55 (October 12, 1979).

In this case, respondents' reasons for refusing to comply with the ALJ's discovery orders are hardly compelling. Particularly inexplicable is the refusal of respondent Anderson even to appear in response to a subpoena *ad testificandum*. The asserted reason for this refusal is that Mr. Anderson was concerned that use might be made of the proffered testimony in connection with anticipated and later pending criminal matters. This argument, however, takes no account of the fact that Mr. Anderson would have been free at any time in his deposition to assert his Fifth Amendment privilege against self-incrimination, at which point, the record reveals, he would have been granted use immunity.[23]

Mr. Anderson was in intimate control of the operations of MDC and later CRC. He was obviously the party best situated to shed light on numerous issues involved in this case. His [24]adamant and wholly unjustified refusal to do so fully justifies the inferences drawn by Judge Howder therefrom.[24]

We also find that it was not improper for the law judge to prohibit

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[23] Respondents during trial made the imaginative argument that a grant of immunity pursuant to 18 U.S.C. [illegible] would have been insufficient to protect them because it contemplates immunity only for "witnesses", not "parties." "Parties", however, can be "witnesses" and we can find no support for the notion that the statute would be inapplicable to a party in a civil proceeding who is subpoenaed to testify as a witness. Nor would the Department of Justice appear to be concerned by the distinction, for it routinely authorized granting of immunity to each of the parties in this proceeding.

[24] Respondents also argue that complaint counsel were unjustified in seeking discovery from CRC and Mr. Anderson without a showing that the information could not be obtained elsewhere. This, however, is not the proper standard for discovery. Of course, some of the information sought by complaint counsel could have been obtained elsewhere, and was and has been, at enormous cost. It is obvious, however, that CRC and Mr. Anderson were the best possible sources of a large amount of relevant information.

Mr. Anderson from testifying on his own behalf, following Mr. Anderson's adamant refusal to appear for a deposition. It is standard practice that where a party to litigation refuses to respond to valid discovery orders, that party will not subsequently be allowed to introduce at trial documentary or testimonial evidence withheld during discovery, *e.g., NLRB* v. *American Art Industries*, 415 F.2d 1223 (5th Cir. 1969), *cert. denied*, 397 U.S. 990, *reh. denied*, 398 U.S. 944, (1970), *cert. denied*, 401 U.S. 912 (1971) (administrative proceeding); Fed. R. Civ. P. 37(b)(2)(B); *Chesa International Ltd.* v. *Fashion Associates, Inc.*, 425 F. Supp. 234, 237, 22 FRServ. 2d 1191 (S.D.N.Y. 1977); *SEC* v. *American Beryllium Oil Corp.*, 303 F.Supp. 912, 921 (D.C.N.Y. 1969); *Bernat* v. *Pennsylvania R.R.*, 14 FRD 465, 18 FRServ. 37b.232,Case 1 (E.D.Pa. 1953). In this case, Mr. Anderson refused repeatedly and without credible justification to be deposed with respect to any of the allegations of the complaint, or his possible defenses thereto. It was, accordingly, appropriate that he not be permitted to testify later.[25]
[25]

Similarly, the other sanctions imposed by Judge Howder—refusing to permit introduction of documents withheld during discovery, and permitting introduction of secondary evidence without objection to shed light on issues as to which discovery had been resisted were also proper exercises of the trial judge's discretionary authority to maintain the integrity of the adjudicative process in the face of respondents' recalcitrance, *e.g., NLRB* v. *C.H. Sprague & Son Co.*, 428 F.2d 938 (1st Cir. 1970); *NLRB* v. *American Art Industries, Inc., supra*, 415 F.2d at 1229–30.

For the foregoing reasons we shall sustain those findings of violation (all of which pertain only to Mr. Anderson) for which documentary and testimonial evidence introduced by complaint counsel is alone insufficient support, and which, therefore, depend for their sustenance upon the sanctions entered by the ALJ. These findings appear at I.D. 133, 135, 171, 174, 179, and 182. We note again, however, that insofar as our *order* in this case is concerned, the foregoing conclusions are irrelevant, inasmuch as each order provision is independently warranted by findings of other deceptive practices that do not depend upon the sanctions for their support.

C. Miscellaneous Allegations of Procedural Error

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[25] Preclusion of testimony by Mr. Anderson was also justified in order to prevent unfair surprise to complaint counsel, a point recognized by Mr. Anderson's counsel, who acknowledged that if Mr. Anderson chose to testify it would be appropriate that complaint counsel be permitted to depose him beforehand. (Response of Raymond Anderson to Motion for Imposition of Sanctions, etc., filed August 29, 1977, p. 6.) At no time following this suggestion does it appear that Mr. Anderson ever indicated a desire to testify at the hearings, or that he offered complaint counsel the opportunity to depose him.

Respondents' remaining contentions merit little discussion. It is alleged that Judge Howder erred by admitting a variety of documents into the record, including a summary of 3847 consumer complaints received by the Federal Trade Commission against respondents. As noted above (p. 19) these documents were admitted pursuant to the sanctions, to compensate complaint counsel for evidence as to the magnitude of abuse that they might have obtained had respondents complied with discovery requests. The consumer complaints were utilized only as an adjunct to massive record testimony of deceptive practices, and serve merely as one quantitative indicator of the volume of consumer injury. They were properly admitted, under the circumstances, for this limited purpose. [26]

Respondents allege that other documents were improperly admitted. One of these documents was not admitted (CX 1045), some do not exist (CX 4575-6), and of those that were admitted, Judge Howder acted well within the discretion of an administrative law judge in so doing.

Respondents also allege error in the failure of Judge Howder to grant them discovery to determine whether certain evidence introduced into the record may have been improperly obtained by complaint counsel. Respondents have, however, made no plausible showing that would warrant this sort of fishing expedition. The fact that complaint counsel have made contact with various other law enforcement authorities concerned with CRC's practices is no basis for any inference that protective orders or grand jury secrecy have been breached. Denial of the discovery requests was well within the discretion of the judge.

Finally, respondents contend that a consent agreement executed by CRC with the United States Postal Service on the day Judge Howder's initial decision was entered obviates the need for a Commission order in this case. The Postal Service order, however, is in several important respects less extensive than that entered by Judge Howder. Of greatest significance, the order covers only vacation certificates, while Judge Howder's covers all products.

Many of the deceptive practices involved in this case are readily transferable to a wide range of products, and the public requires protection against such transference. Indeed, the record already reflects the use of deceptive practices with respect to a variety of products other than vacation certificates (*e.g.*, sewing machines, treasure chests). Moreover, the Postal Service order appears to extend only to Columbia Research Corporation, not to Raymond Anderson individually. It, therefore, leaves open the possibility that Mr. Anderson will simply walk away from a bankrupt CRC as he left the 93,000 unsecured creditors of MDC—free of their claims and free to resume the same exploitive practices through yet another corporate shell. The order entered herein will forbid this on pain of civil penalties.

Order

Respondents have not objected to any specific provisions of the order, arguing only that no order should enter for the reasons discussed herein. We have entered the order recommended by Judge Howder with minor stylistic changes, and with one small change of substance. [27]

The change of substance is that the phrase "thirty (30) days" in Paragraph I(7)(b) has been changed to "fifteen (15) days". As revised, Paragraph I(7) now requires, *inter alia*, that respondents acknowledge requests by their customers for accommodations within (a) any time period specifically, clearly, and conspicuously disclosed in their initial solicitation, or (b) if no time period is disclosed, then within 15 days.

The record reveals that one of the difficulties encountered by consumers who sent in their $15 expecting a reasonable vacation opportunity in return, was that long periods of time were consumed in attempting to obtain confirmed reservations. In some cases, the long lead times rendered the opportunity unsuitable to the consumer; in other cases, the long lead times, followed by rejection of the proposed choice and the necessity to make another, made use of the vacation opportunity virtually impossible.

Judge Howder's proposed order would allow respondents to specify a time within which reservation requests will be acknowledged, and require acknowledgment within 30 days if no time period is specified. A 30-day acknowledgment period is, we believe, too long. Consumers reasonably expect (absent disclosure to the contrary), that it should be possible to acknowledge a request for accommodations within less than 30 days from the time the vacation arranger receives the request. Complaint counsel, in their proposed order submitted to ALJ Howder suggested a time period of 15 days, and we agree that this is reasonable.[26] Again, we note that if respondents require a longer period of time within which to acknowledge requests for reservations, they need only *inform* consumers before they send in their money that the consumers can expect to wait some specified longer period of time before they will [28]be told as to whether their request has been accepted. This bit of highly material information will then permit consumers to assess more acutely whether the proferred vacation opportunity is worth the risk of $15.00.

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[26] A worthwhile comparison may be made with order Paragraph I(10), which requires respondents to ship ordered merchandise within 30 days of receipt of an order unless a different time period is specified. This tracks the Commission's Trade Regulation Rule on Mail Order Merchandise. It is obviously more difficult to arrange for the shipment of merchandise than it is to mail a postcard advising a consumer that a reservation request has been accepted or rejected. Accordingly, absent disclosure of how long either process should take, consumers will normally expect the shipment of merchandise to take longer than the acknowledgment of a reservation request. It is, therefore, appropriate that Paragraph I(7) specify a shorter time period than Paragraph I(10), although again, we note that respondents are free to establish any time period they wish for acknowledging reservations or shipping merchandise, so long as consumers are advised of this time period before having to commit money.

With the foregoing substantive change, and minor stylistic changes, the order framed by Judge Howder, to the specifics of which respondents have not objected, is appended and will be entered.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel for respondents Raymond Anderson and Columbia Research Corporation from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeal. The Commission, for the reasons stated in the accompanying Opinion, has denied the appeal. Therefore,

It is ordered, That the initial decision of the administrative law judge, pages 1-94, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with the attached opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be entered: [2]

ORDER

I

It is ordered, That respondents Columbia Research Corporation, Raymond Anderson and Joseph Anderson, their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of vacation certificates and packages, sewing machines, household and cosmetic products, mail order goods, or other goods or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Making or participating in the making, in any manner and by any means, of false, misleading or deceptive representations for the purpose of aiding in the securing of leads or prospects for the sale of any product or service, the demonstrating of any product or service, the selling of any product or service, the distributing of any product or service, or any other purpose.

(2) Representing, in any manner and by any means, that respondents are conducting a contest, unless:

(a) the contest is bona fide;

(b) all prizes advertised to be awarded will be awarded; and

(c) respondents maintain all records pertaining to such contest for three (3) years subsequent to the end of the contest.

(3) Representing, in any manner and by any means, that recipients of respondents' solicitations are winners, or that prizes, awards or gifts will be given, or the conditions under which such prizes, awards or gifts will be given, including, but not limited to, representation by use of such terms as "prizes," "awards," "winnings," "gifts," "bonuses," "free" or terms of similar import and meaning, unless the recipients of such prizes, awards or gifts incur no financial or other obligation as a condition of obtaining such prizes, awards, or gifts. [3]

(4) Misrepresenting, in any manner and by any means, the character of any business conducted by respondents, including, but not limited to, misrepresentation through misleading corporate names, misleading titles for corporate officers, or statements or expressions conveying that respondents engage in market research and analysis, conduct incentive programs or promotions, or make use of a special method of selecting prospective customers to receive respondents' solicitations.

(5) Representing, in any manner and by any means, that respondents have co-sponsors or represent other companies, unless:

(a) the co-sponsorship or representation of another company is bona fide; and

(b) the co-sponsors or represented companies have actual knowledge of and have approved the use of any such representation by respondents prior to respondents' representation to any third party.

(6) Representing, in any manner and by any means, that recipients of respondents' solicitations have a limited time within which to reply to or accept respondents' offers, unless such time limitation is bona fide.

(7) Representing, in any manner and by any means, that recipients of respondents' solicitations can exercise a choice regarding the selection of any product or service offered by respondents, including, but not limited to, vacation times, locations or accommodations, unless such choice selections are actually made available and recipients receive a response to their indication of such choice within a reasonable time period.

For purposes of this paragraph, "a reasonable time period" shall be:

(a) that period of time specified in respondents' solicitation if such period is clearly and conspicuously disclosed in the solicitation; or [4]

(b) if no period of time is clearly and conspicuously disclosed, a period of fifteen (15) days following the date that the recipient's indication of choice is received by respondents or by a designated agent of respondents.

(8) Misrepresenting, in any manner and by any means, the nature of respondents' goods and services, the stated value of their goods and services, the total cost of their goods and services, the retail price of their goods and services, or any other price or value against which the goods and services offered in respondents' solicitations are being compared, including, but not limited to, misrepresentation by use of such terms as "full-size," "savings," "value," "special," "retail price," "regular price," "list price," "former price" or terms of similar import and meaning, or misrepresentation by failing to clearly and conspicuously disclose, in the solicitation or other promotion, that purchasers will or may incur additional costs in connection with the purchase of respondents' goods and services, such as delivery costs, or extra room charges, and the approximate amount of room charges, and the approximate amount of each additional cost.

(9) Failing to clearly and conspicuously disclose, in any manner and by any means, in any solicitation or other promotion, any relationship between respondents' offer and the subsequent sales promotion of other products or services by respondents and/or other companies, including, but not limited to, the promotion of land or property sales programs.

(10) Failing to deliver goods or perform services ordered by purchasers from respondents within a reasonable time period. If delivery or performance cannot be completed within such a reasonable time period, then respondents shall clearly and conspicuously offer in writing to such purchaser, no later than at the expiration of the reasonable time period, an option either to consent to a delay in delivery or performance or to cancel his or her order and receive a full refund which shall be sent by respondents by first class mail within seven (7) working days of the date on which respondents receive such purchaser's notice of cancellation. [5]

For purposes of this paragraph, "a reasonable time period" shall be:

(a) that period of time specified in respondents' solicitation if such period is clearly and conspicuously disclosed to the purchaser in the solicitation; or

(b) if no period of time is clearly and conspicuously disclosed, a period of thirty (30) days following the date that the purchaser's order is received by respondents or by a designated agent of respondents.

(11) Representing, in any manner and by any means, that any product or service offered in respondents' solicitations is guaranteed or

warranted, including, but not limited to, representation by use of such terms as "guarantee," "warranty," "money-back guarantee" or terms of similar import and meaning, unless the terms, conditions and limitations of the guarantee or warranty, the identity of the guarantor or warrantor and the manner in which the guarantor or warrantor will perform thereunder are clearly and conspicuously disclosed in writing in the solicitation, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of such guarantee or warranty.

(12) Failing to respond to each and every written inquiry concerning transactions with customers within seven (7) working days after the date respondents receive such inquiry.

(13) Making or participating in the making, in any manner and by any means, of any of the above representations unless respondents actually have a reasonable basis for so doing.

II.

It is further ordered, That respondents Columbia Research Corporation, Raymond Anderson and Joseph Anderson, their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of vacation certificates and packages, sewing machines, household and cosmetic products, mail order goods, or other goods or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain: [6]

(1) Legible copies of all written inquiries concerning transactions with customers, and the responses thereto. Such correspondence shall be maintained for a period of not less than three (3) years from the date each piece of correspondence is received or sent by respondents.

(2) Records which disclose the following information:

(a) the name and address of each customer requesting a refund;

(b) the date that respondents receive each request for a refund;

(c) if a refund has been granted, the amount of the refund and the date that it was sent to the customer;

(d) if a refund has been denied, a copy of the written request, the date a written explanation of the denial was sent to the customer and a copy of the written explanation.

Such records shall be maintained for a period of not less than three (3) years from the date that the customer sent in the request for a refund.

Respondents shall grant any duly authorized representative of the Federal Trade Commission, upon reasonable notice of time and place, access to all records that are required to be maintained under Parts I, II and IV of this order, and shall furnish to the Federal Trade Commission any copies of such records that are requested by any of its duly authorized representatives.

III

It is further ordered, That the complaint be, and hereby is, dismissed as to respondent Juanita Anderson.

IV

Compliance with the terms of this order in no way relieves respondents from the obligation to comply with all applicable statutes and Trade Regulation Rules of the Federal Trade Commission pertaining to mail order sales, warranties or any other subject, [7] whether or not related to this order. In the event that any such statute or Trade Regulation Rule imposes upon respondents contradictory, as opposed to additional or more stringent, duties, respondents may petition the Federal Trade Commission for a modification of this order or for an exemption from the pertinent Trade Regulation Rule.

It is further ordered, That respondents shall distribute a copy of this order to all operating divisions of Columbia Research Corporation and to present or future employees, agents or representatives of said corporation, and that respondents shall secure from each such individual a signed statement acknowledging receipt of said order.

It is further ordered, That, for a period of twenty (20) years following the effective date of this order, respondent Raymond Anderson shall promptly notify the Commission of the discontinuance of his then current business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties, responsibilities and financial interest in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That, for a period of ten (10) years following the effective date of this order, respondent Joseph Anderson shall promptly notify the Commission of the discontinuance of his then current business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties, responsibilities and financial interest in connection with the business or employment. The expiration of the obligations of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, Columbia Research Corporation, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order. [8]

It is further ordered, That respondents herein shall within sixty (60) days and one (1) year following the effective date of the order, and at such other times as the Commission may require, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order.

IN THE MATTER OF

SAN-MAR LABORATORIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3003. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, two Elmsford, N.Y. firms and their corporate president, engaged in the manufacture and marketing of "Acne Lotion 22," the "Acne Masque," and the "Home Acne Kit," to cease disseminating advertisements which represent that their products can cure acne or eliminate bacteria-caused skin blemishes; or which misrepresent or make unsubstantiated claims regarding the superiority, efficacy, and performance of their products; the extent to which their products have been tested; and the results of the tests. Respondents are required to inform purchasers of their right to request and receive refunds; and honor refund requests in a timely manner. Additionally, respondents are required to maintain specified records for a period of three years.

Appearances

For the Commission: *Mark A. Heller.*

For the respondents: *Burt Bauman,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that San-Mar Laboratories, Inc. (hereinafter "San-Mar") and Maison Drug Company, Inc. (hereinafter "Maison Drug"), corporations, and Marvin Berkrot, (hereinafter "Berkrot") as an individual and corporate officer, hereinafter at times referred to as respondents, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

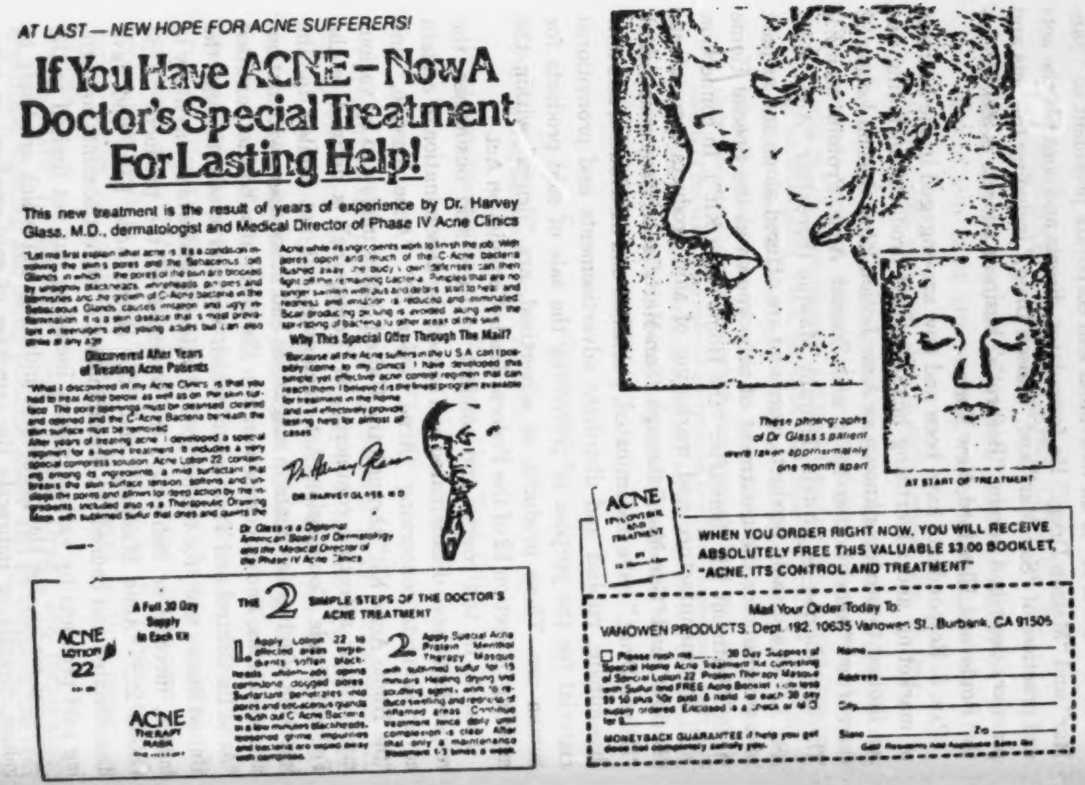
PARAGRAPH 1. "San-Mar" and "Maison Drug" are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal places of business located at 399 Executive Boulevard, Elmsford, New York. "San-Mar" and "Maison Drug" manufacture, market and advertise health-related products. "Maison Drug" is a wholly-owned subsidiary of "San-Mar."

PAR. 2. "Berkrot" is an individual and corporate president of "San-Mar" and "Maison Drug." He formulates, directs and controls the acts and practices of "San-Mar" and "Maison Drug," including the acts and practices described herein. "Berkrot's" business address is 399 Executive Boulevard, Elmsford, New York.

PAR. 3. Respondents have been and now are engaged in the business of marketing and advertising health-related products, including but not limited to products known as Acne Lotion 22 or Special Lotion 22 (hereafter "Acne Lotion 22"); and Special Acne Protein Menthol Therapy Masque or Protein Therapy Masque (hereafter "Acne Masque"). The aforesaid products were and are offered alone and as part of a program for the treatment of acne known as the Special Home Acne Treatment Kit (hereafter "the Home Acne Kit"). In connection with the manufacture and marketing of said products respondents "Berkrot" and "San-Mar," through "San-Mar's" subsidiary, respondent "Maison Drug," have disseminated, published and distributed, and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said products for human use. These products, as advertised, are "drugs" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations, and advertisements in the form of a booklet, entitled "Acne Its Control and Treatment" which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the products "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit," and have disseminated and caused the dissemination of advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly the purchase of said products in commerce.

PAR. 5. Typical of the statements and representations in said advertisements disseminated as previously described, but not necessarily inclusive thereof, are the following:



AT LAST — NEW HOPE FOR ACNE SUFFERERS!

If You Have ACNE – Now A Doctor's Special Treatment For Lasting Help!

This new treatment is the result of years of experience by Dr. Harvey Glass, M.D., dermatologist and Medical Director of Phase IV Acne Clinics

"Let me first explain what acne is. It is a condition involving the skin's pores and the Sebaceous (oil) Glands in which the pores of the skin are blocked by unsightly blackheads, whiteheads, pimples and blemishes and the growth of C-Acne bacteria in the Sebaceous Glands causes irritation and ugly inflammation. It is a skin disease that is most prevalent in teenagers and young adults but can also strike at any age.

Discovered After Years of Treating Acne Patients

"What I discovered in my Acne Clinics is that you had to treat Acne below as well as on the skin surface. The pore openings must be cleansed, cleared and opened and the C-Acne Bacteria beneath the skin surface must be removed.

After years of treating acne I developed a special regimen for a home treatment. It includes a very special compress solution Acne Lotion 22 containing among its ingredients a mild surfactant that breaks the skin surface tension, softens and unclogs the pores and allows for deep action by the ingredients. Included also is a Therapeutic Drawing Mask with sublimed sulfur that dries and opens the Acne while its ingredients work to finish the job. With pores open and much of the C-Acne bacteria flushed away the body's own defenses can then fight off the remaining bacteria. Pimples that are no longer swollen with pus and debris start to heal and redness and irritation is reduced and eliminated. Scar producing picking is avoided along with the spreading of bacteria to other areas of the skin.

Why This Special Offer Through The Mail?

"Because all the Acne sufferers in the U.S.A. can't possibly come to my clinics I have developed this simple yet effective acne control regimen that can reach them. I believe it is the finest program available for treatment in the home and will effectively provide lasting help for almost all cases.

DR. HARVEY GLASS, M.D.

Dr. Glass is a Diplomat American Board of Dermatology and the Medical Director of the Phase IV Acne Clinics

These photographs of Dr Glass's patient were taken approximately one month apart

AT START OF TREATMENT

ACNE LOTION 22

A Full 30 Day Supply In Each Kit

ACNE THERAPY MASK

THE 2 SIMPLE STEPS OF THE DOCTOR'S ACNE TREATMENT

1. Apply Lotion 22 to affected areas. Ingredients soften blackheads, whiteheads, open comedones, clogged pores. Surfactant penetrates into pores and sebaceous glands to flush out C-Acne Bacteria. In a few minutes blackheads, loosened grime, impurities and bacteria are wiped away with compress.

2. Apply Special Acne Protein Menthol Therapy Masque with sublimed sulfur for 15 minutes. Healing, drying and soothing agents work to reduce swelling and redness of inflamed areas. Continue treatment twice daily until complexion is clear. After that only a maintenance treatment 1-3 times a week.

ACNE ITS CONTROL AND TREATMENT

WHEN YOU ORDER RIGHT NOW, YOU WILL RECEIVE ABSOLUTELY FREE THIS VALUABLE $3.00 BOOKLET, "ACNE, ITS CONTROL AND TREATMENT"

Mail Your Order Today To:

VANOWEN PRODUCTS, Dept. 192, 10635 Vanowen St., Burbank, CA 91505

☐ Please rush me ____ 30 Day Supplies of Special Home Acne Treatment Kit consisting of Special Lotion 22, Protein Therapy Masque with Sulfur and FREE Acne Booklet [illegible] $9.50 plus 50¢ post. & hand. for each 30 day supply ordered. Enclosed is a check or M.O. for $____

MONEYBACK GUARANTEE if help you get does not completely satisfy you.

Name ____

Address ____

City ____

State ____ Zip ____

Calif. Residents Add Applicable Sales Tax

PAR. 6. Through the use of said advertisements and other advertisements referred to in Paragraphs Four and Five, respondents represented, and now represent, directly or by implication that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," will cure acne regardless of the severity of the condition.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria responsible for pimples, blackheads, whiteheads, and other acne blemishes.

c. Several minutes after use of "Acne Lotion 22" the bacteria responsible for acne are flushed out of the pores of the skin and can be easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of "the Home Acne Kit," have been medically and scientifically proven effective in the treatment of acne by clinical testing.

PAR. 7. In truth and in fact:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," will not cure acne.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. The bacteria contributively responsible for acne cannot be flushed out of the pores of the skin and easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of "the Home Acne Kit," are not medically or scientifically proven effective in the treatment of acne by clinical testing.

Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statements and representations set forth in Paragraph Six, were and are false, misleading or deceptive.

PAR. 8. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondents represented, and now represent that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," are superior to all prescription and/or over-the-counter acne preparations in the treatment of acne.

c. "The Home Acne Kit" is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than Dr. Harvey Glass, whose endorsement of "the Home Acne Kit" appears in said advertisements.

PAR. 9. In truth and in fact, there existed at the time of the first dissemination of the representations in Paragraphs Six and Eight no reasonable basis for making them, in that respondents lacked competent and reliable scientific evidence to support each such representation. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

PAR. 11. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of the respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents San-Mar Laboratories, Inc. and Maison Drug Company, Inc. are corporations organized, existing, and doing business under and by virtue of the laws of the State of New York, with their principal offices and places of business at 399 Executive Boulevard, Elmsford, New York.

2. Respondent Marvin Berkrot is an individual and corporate officer of San-Mar Laboratories, Inc., and Maison Drug Company, Inc., and maintains an office at 399 Executive Boulevard, Elmsford, New York.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents San-Mar Laboratories, Inc. and Maison Drug Company, Inc., corporations, and Marvin Berkrot, individually and as a corporate officer, their successors and assigns, either jointly or individually, and the corporate respondents' officers, agents, representatives, and employees, directly or through any corporation, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisements by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," or any other acne product or regimen will cure acne.

2. Represents that "Acne Lotion 22" and/or "Acne Masque," or any chemically similar formulations, either alone or as part of "the Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria contributively responsible for acne, pimples, blackheads, whiteheads, and other acne blemishes.

3. Represents that the bacteria contributively responsible for acne can be flushed out of the pores of the skin and/or easily eliminated from the skin surface.

4. Misrepresents, the efficacy, use or the mode of performance of any drug where the use or reasonably foreseeable misuse of the drug may affect the health or safety of the user.

5. Misrepresents the extent to which any product has been tested or the results of any such tests.

B. Disseminating or causing the dissemination of any advertisements by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease;

2. Represents that "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," or any other acne product or regimen, are superior to all prescription and/or over-the-counter acne preparations in the treatment of acne;

3. Represents that "the Home Acne Kit," or any other acne product or regimen, is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than Dr. Harvey Glass;

4. Represents that "the Home Acne Kit," or any other acne product or regimen, is efficacious in any manner in the treatment of acne,

unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two double-blind clinical studies which conform to accepted designs and protocols and are conducted by different persons, independently of each other. Such persons shall be dermatologists who are recognized as specialists in acne and its treatment and who are experienced in conducting such studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

II

It is further ordered, That respondents shall:

A. Within thirty (30) days after entry of this order notify each purchaser of one or more orders of the Special Home Acne Kit, who has not received nor is in the process of receiving a full refund on their purchase prior to that time, of the purchaser's right to a refund in the amount of the full purchase price excluding the cost of mailing. Said notice shall be in the form of a letter identical in form, language and content to that annexed hereto as Attachment A (hereinafter "the notice"). The notice shall be sent to said purchasers by first class mail, and shall not include any other written matter which would obscure its clear meaning, nor any solicitation for respondents' products.

B. Refund the full purchase price of the Special Home Acne Kit, excluding the cost of mailing, by check, to any purchaser who responds to the notice within ten (10) weeks of its mailing. Such refunds shall be mailed to purchasers who request refunds no later than fourteen (14) weeks after the notice is sent to said purchasers.

C. Proof of compliance with this section shall be sent to the Commission by registered mail upon completion of the processing of all refund requests made pursuant to the notice. Said proof shall include all refund requests by purchasers made pursuant to the notice, and such records as will show full payment to these purchasers.

III

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, and one (1) year thereafter, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

It is further ordered, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

ATTACHMENT A

(Maison Drug Company Letterhead)

Dear Customer:

According to our records, you have purchased our Special Home Acne Treatment Kit, consisting of Special Lotion 22, Protein Therapy Masque, and a booklet on acne.

The Federal Trade Commission has recently brought to our attention certain questions about advertising claims we made for the Special Home Acne Treatment Kit.

We have agreed with the Commission to make sure that all our customers who purchased the Special Home Acne Kit are satisfied that it performed as they expected it would, and to refund the full purchase price to cusomters who may have not been satisfied.

If you choose to request a refund because of dissatisfaction with the product, submit proof of purchase (check or money order will do) and we will remit payment. You must complete the form below and return it no later than   . Please allow fourteen (14) weeks from receipt for processing of your refund request.

Sincerely,

MARVIN BERKROT, President
MAISON DRUG COMPANY

....

(cut along dotted line)

Dear Mr. Berkrot:

I was not satisfied that the Special Home Acne Kit performed as I expected it would.

I purchased _____ (insert number of Kits you bought) Kits. I enclose herewith proof of purchase.

My full name and address is:

NAME: ____________________

ADDRESS: ____________________

Street Apt. No.

____

City State Zip

SIGNATURE: ____________________

AFTER YOU HAVE COMPLETED THIS FORM, SEND IT TO:

Marvin Berkrot, President
Maison Drug Company
399 Executive Boulevard
Elmsford, New York 10523

IN THE MATTER OF

HARVEY GLASS, M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3004. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, a Cherry Hill, N.J. dermatologist to cease, in connection with the endorsing, advertising or sale of products, representing that the use of "Acne Lotion 22," "Acne Masque," or any other acne product or regimen will cure acne; eliminate bacteria-caused skin blemishes and result in a blemish-free skin. The respondent is also prohibited from disseminating advertisements and/or permitting his endorsement to appear in advertisements which misrepresent or make unsubstantiated claims regarding a product's efficacy, use or performance; the extent to which a product has been tested and the results of such tests.

Appearances

For the Commission: *Mark A. Heller.*

For the respondent: *Barry Greenberger,* Bricktown, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Harvey Glass, M.D., an individual (hereafter "Glass"), at times referred to as respondent, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

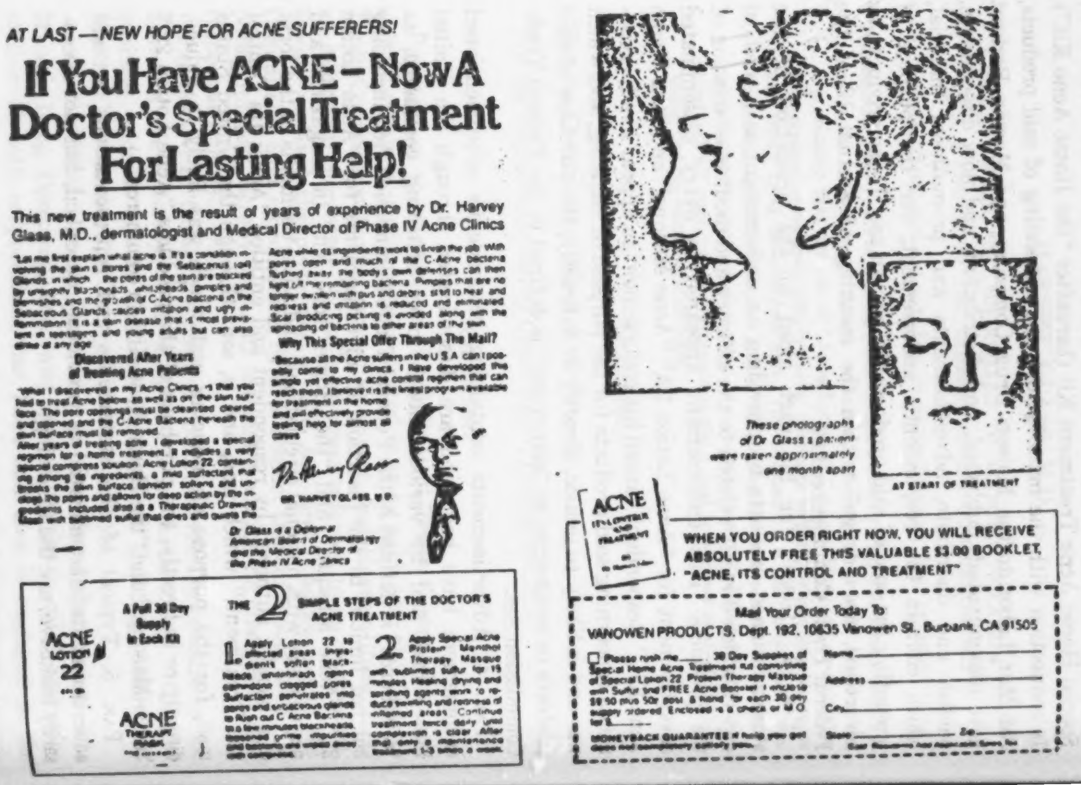
PARAGRAPH 1. "Glass" is a medical doctor, licensed to practice by the State of New Jersey, with a specialty in dermatology. "Glass's" business address is Old Orchard Professional Building, 1999 East Marlton Pike (Route 70), Cherry Hill, New Jersey.

PAR. 2. "Glass," in conjunction with San-Mar Laboratories, Inc., Maison Drug Company, Inc., and Marvin Berkrot, chief executive officer of both corporations, has been and now is engaged in the business of marketing and advertising health-related products, including but not limited to products known as Acne Lotion 22, or Special Lotion 22 (hereafter "Acne Lotion 22"); and Special Acne Protein Menthol Therapy Masque, or Protein Therapy Masque (hereafter "Acne Masque"). The aforesaid products were and are offered alone and as part of a program for the treatment of acne known as the Special Home Acne Treatment Kit (hereafter "the Home Acne Kit"). In connection with the manufacture and marketing of said products, San-Mar Laboratories, Maison Drug Company, and Marvin Berkrot have disseminated, published, and distributed, and now disseminate, publish and distribute, advertisements and promotional material, which contain the respondent's endorsement, for the purpose of promoting the sale of said products for human use. These products, as advertised, are "drugs" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. "Glass" for his part aided in the promotion of the aforementioned products by providing an endorsement as a medical expert which directly related to the efficacy and medical evaluation of the products. This endorsement appeared in every disseminated advertisement for "Acne Lotion 22," "Acne Masque" and "the Home Acne Kit." Respondent caused his endorsement to appear in advertisements concerning said products for the purpose of inducing, and which was and is likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Advertisements containing respondent's aforementioned endorsement have been and are disseminated through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to the insertion of advertisements for "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" in magazines and newspapers with national circulations, and advertisements in the form of a booklet authored by respondent and entitled "Acne: Its Control and Treatment," which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the products "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" in commerce.

PAR. 5. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive, are the following:



AT LAST—NEW HOPE FOR ACNE SUFFERERS!

If You Have ACNE—Now A Doctor's Special Treatment For Lasting Help!

This new treatment is the result of years of experience by Dr. Harvey Glass, M.D., dermatologist and Medical Director of Phase IV Acne Clinics

"Let me first explain what acne is. It's a condition involving the skin's pores and the Sebaceous (oil) Glands in which the pores of the skin are blocked by unsightly blackheads, whiteheads, pimples and blemishes and the growth of C-Acne bacteria in the Sebaceous Glands causes irritation and ugly inflammation. It is a skin disease that is most prevalent in teenagers and young adults but can also strike at any age.

Discovered After Years of Treating Acne Patients

"What I discovered in my Acne Clinics is that you had to treat Acne below as well as on the skin surface. The pore openings must be cleansed, cleared and opened and the C-Acne Bacteria beneath the skin surface must be removed.

After years of treating acne, I developed a special regimen for a home treatment. It includes a very special compress solution, Acne Lotion 22, containing among its ingredients, a mild surfactant that breaks the skin surface tension, softens and unclogs the pores and allows for deep action by the ingredients. Included also is a Therapeutic Drawing Mask with sublimed sulfur that dries and quells the Acne while its ingredients work to finish the job. With pores open and much of the C-Acne bacteria flushed away, the body's own defenses can then fight off the remaining bacteria. Pimples that are no longer swollen with pus and debris start to heal and redness and irritation is reduced and eliminated. Scar producing picking is avoided along with the spreading of bacteria to other areas of the skin.

Why This Special Offer Through The Mail?

"Because all the Acne sufferers in the U.S.A. can't possibly come to my clinics, I have developed the simple yet effective acne control regimen that can reach them. I believe it is the finest program available for treatment in the home and will effectively provide lasting help for almost all cases."

Dr. Harvey Glass

DR. HARVEY GLASS, M.D.

Dr. Glass is a Diplomat American Board of Dermatology and the Medical Director of the Phase IV Acne Clinics

THE 2 SIMPLE STEPS OF THE DOCTOR'S ACNE TREATMENT

1. Apply Lotion 22 to affected areas. Ingredients soften blackheads, whiteheads, [illegible] clogged pores. Surfactant penetrates into pores and sebaceous glands to flush out C-Acne Bacteria. In a few minutes blackheads, loosened grime, impurities and bacteria are wiped away with compress.

2. Apply Special Acne Protein Menthol Therapy Masque with sublimed sulfur for 15 minutes. Healing, drying and soothing agents work to reduce swelling and redness of inflamed areas. Continue treatment twice daily until complexion is clear. After that only a maintenance treatment 1-3 times a week.

A Full 30 Day Supply In Each Kit

These photographs of Dr Glass's patient were taken approximately one month apart

AT START OF TREATMENT

WHEN YOU ORDER RIGHT NOW, YOU WILL RECEIVE ABSOLUTELY FREE THIS VALUABLE $3.00 BOOKLET, "ACNE, ITS CONTROL AND TREATMENT"

Mail Your Order Today To:
VANOWEN PRODUCTS, Dept. 192, 10635 Vanowen St., Burbank, CA 91505

☐ Please rush me ____ 30 Day Supplies of Special Home Acne Treatment Kit consisting of Special Lotion 22, Protein Therapy Masque with Sulfur and FREE Acne Booklet. I enclose $[illegible] plus 50¢ post. & hand. for each 30 day supply ordered. Enclosed is a check or M.O. for $____

MONEYBACK GUARANTEE [illegible]

Name ____
Address ____
City ____
State ____ Zip ____

Calif. Residents Add Applicable Sales Tax

PAR. 6. Through his endorsement as contained in said advertisements and other advertisements referred to in Paragraphs Four and Five, respondent represented, and now represents, directly or by implication that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will cure acne regardless of the severity of the condition.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria responsible for pimples, blackheads, whiteheads, and other acne blemishes.

c. Several minutes after use of "Acne Lotion 22" the bacteria responsible for acne are flushed out of the pores of the skin and can be easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of the "Home Acne Kit," have been medically and scientifically proven effective in the treatment of acne by clinical testing.

PAR. 7. In truth and in fact:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will not cure acne.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. The bacteria contributively responsible for acne cannot be flushed out of the pores of the skin and easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of the "Home Acne Kit," are not medically or scientifically proven effective in the treatment of acne by clinical testing.

Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements, and respondent knew or should have known that the statements and representations set forth in Paragraph Six were and are false, misleading or deceptive.

PAR. 8. Furthermore, through his endorsement contained in the advertisements referred to in Paragraphs Four and Five, respondent represented, and now represents that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," are superior to all prescription and/or over-the-counter preparations in the treatment of acne.

c. "The Home Acne Kit" is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than the respondent.

PAR. 9. In truth and in fact, there existed at the time of the first dissemination of the representations in Paragraphs Six and Eight no reasonable basis for making them in that respondent lacked competent and reliable scientific evidence to support each such representation. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct of his aforesaid business, and at all times mentioned herein, the respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

In addition to the above, respondent is in substantial competition with other corporations, firms and individuals in the business of providing endorsements for consumer products or services.

PAR. 11. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, including his endorsement as contained and disseminated in the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Harvey Glass, M.D. is a medical doctor, licensed to practice by the State of New Jersey, with a specialty in dermatology. His business address is Old Orchard Professional Building, 1999 East Marlton Pike (Route 70), Cherry Hill, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Harvey Glass, M.D., individually and through any corporate entity over which he now or hereafter exercises control, and his corporate successors and assigns, in connection with the endorsing, advertising, offering for sale, sale, or distribution of all products, forthwith cease and desist from:

A. Representing, directly or indirectly, through advertisements in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will cure acne or any skin condition associated with acne;

2. "Acne Lotion 22" and/or "Acne Masque," or any chemically similar formulations, either alone or as part of the "Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria

contributively responsible for acne, pimples, blackheads, whiteheads, and other acne blemishes;

3. The bacteria contributively responsible for acne can be flushed out of the pores of the skin and/or easily eliminated from the skin surface.

B. Representing directly or indirectly through advertisements in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease;

2. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen are superior to all prescription and/or over-the-counter acne preparations in the treatment of acne;

3. The "Home Acne Kit" or any other acne product or regimen is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than the respondent;

4. "The Home Acne Kit" or any other acne product or regimen is efficacious in any manner in the treatment of acne,

Unless, at the time of each dissemination of such representation(s) respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two double-blind clinical studies which conform to accepted designs and protocols and are conducted by different persons, independently of each other. Such persons shall be dermatologists who are recognized as specialists in acne and its treatment and who are experienced in conducting such studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and/or permitting or otherwise causing his endorsement to appear in any such advertisement which directly or indirectly:

1. Misrepresents the efficacy, use or the mode of performance of any "drug," "cosmetic," "device," or "food," (as these terms are defined by Section 15 of the Federal Trade Commission Act, 15 U.S.C.

55) where the use or reasonably foreseeable misuse of the product may adversely affect the health or safety of the user.

2. Misrepresents the extent to which any product has been tested or the results of any such tests.

Provided, however, that respondent shall have an affirmative defense to a compliance suit for violation of this order paragraph where respondent acted only as an endorser and neither knew nor should have known that the advertisement(s) violated the order paragraph.

D. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and/or permitting or causing his endorsement to appear in any such advertisement, which directly or indirectly makes representations referring or relating to the performance or efficacy of any health-related product or refers or relates to any characteristic, property or result of the use of any such product, unless, at the time of each dissemination of such representation(s) respondent possesses and relies upon a reasonable basis for such representation(s).

II

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in his business status, such as incorporation, or any other change which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of his compliance with this order.

It is furthered ordered, That respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and ID of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

IN THE MATTER OF

BAYER AG, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3007. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, a diversified chemical company, located in Leverkusen, Germany, and its two American subsidiaries to divest, within one year to a Commission-approved buyer, all United States assets gained through their acquisition of Miles Laboratories, Inc., primarily utilized in the manufacture, distribution or sale in the United States of allergenic extracts. Additionally, for specified time periods, the firms would be barred from acquiring, without prior Commission approval, any concern engaged in the manufacture, distribution or sale in the United States of allergenic extracts or chemically treated diagnostic reagent strips used for *in vitro* quantitative urinalysis.

Appearances

For the Commission: *Geoffrey Walker, Richard Collier* and *Michelle Crown.*

For the respondents: *John Henry Davis, Cravath, Swaine & Moore,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have acquired Miles Laboratories, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and having found that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, (15 U.S.C. 21), and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For purposes of this complaint, the following definition shall apply:

"Allergenic extracts" are biological products that are administered to man for the diagnosis or treatment of allergies.

II. RESPONDENTS

2. Bayer AG (Bayer) is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany with its principal office and place of business located in Leverkusen, Federal Republic of Germany.

3. In 1976, Bayer, including its German and non-German subsidiaries (Bayer World), had consolidated revenues of approximately $9 billion and consolidated assets of approximately $8.6 billion.

4. Bayer is a diversified chemical company whose principal business, conducted directly and through subsidiaries and affiliates throughout the world, consists of the manufacture and sale of dyestuffs, organic and inorganic chemicals, plastics and surface coatings, agricultural chemicals, pharmaceuticals, polyurethanes, rubber and man-made fibers. In 1976, pharmaceuticals accounted for 13% of Bayer's worldwide sales.

5. Bayer has been engaged in the manufacture and sale of pharmaceuticals and chemicals in the United States since 1895 through a combination of de novo operations, joint ventures and acquisitions. Since 1973, Bayer has acquired, directly or indirectly, the following assets or companies in the United States: Cutter Laboratories, Inc. (1974); the remaining 50% of Helena Chemical Co. from Vertac, Inc. (1977); the Harman Colors business of Allied Chemical Corporation (1977); and Miles Laboratories, Inc. (1978). Total consolidated sales of Bayer in the United States in 1976 amounted to $1.1 billion.

6. Rhinechem Corporation (Rhinechem) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 425 Park Ave., New York, New York. Rhinechem is a wholly-owned subsidiary of Bayer International Finance N.V. which in turn is a wholly-owned subsidiary of respondent Bayer.

7. Through Rhinechem, Bayer conducts its principal operations in the United States through two subsidiaries, Mobay Chemical Corporation and Cutter Laboratories, Inc. Mobay Chemical Corporation is a manufacturer of chemical products with sales in 1976 of $544 million. Cutter Laboratories, Inc. is a manufacturer of biological products, hospital and pharmaceutical supplies with sales in 1976 of $175 million. In 1976, Bayer, through Cutter Laboratories, Inc. was the second largest manufacturer of biological products in the United States with sales of $65 million.

8. Cutter Laboratories, Inc. (Cutter), through its Hollister-Stier Laboratories division, is the largest manufacturer of allergenic extracts in the United States, with 1976 sales in the United States of approximately $7 million.

9. Since 1960, Cutter has grown in the allergenic extracts market through internal expansion and acquisitions, including the acquisitions of Hollister-Stier Co.; Arlington, Inc.; assets of Abbott Laboratories, Inc.; assets of the Lederle Laboratories division of American Cyanamid Co.; and assets of Endo Laboratories, Inc., a subsidiary of E.I. duPont de Nemours & Co.

10. Miles Laboratories, Inc. (Miles Labs) is a corporation existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1127 Myrtle St., Elkhart, Indiana. Miles Labs was organized originally under the name of Rhinechem Laboratories, Inc. for the purpose of acquiring Miles Laboratories, Inc. On February 8, 1979, the acquired company, Miles Laboratories, Inc., merged into its nominal acquirer Rhinechem Laboratories, Inc., and the successor corporation has been named Miles Laboratories, Inc. Miles Labs is a wholly owned subsidiary corporation of respondent Rhinechem.

11. At all times relevant herein, respondents have been and are engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. ACQUISITION

12. As of January 5, 1978, respondents acquired over 90% of the outstanding common shares of Miles Laboratories, Inc. for consideration of approximately $250 million.

IV. ACQUIRED CORPORATION

13. Miles Laboratories, Inc. (Miles) was a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 1127 Myrtle St., Elkhart, Indiana.

14. At the time of the aforesaid acquisition, Miles was engaged principally in the manufacture and sale of pharmaceutical preparations, biological products, diagnostic chemical reagent and microbiological test systems, surgical and medical instruments, abrasive products, chemical products and specialty foods.

15. In 1976, Miles had consolidated worldwide revenues of approximately $450 million and assets of approximately $382 million.

16. Miles is the third largest manufacturer of allergenic extracts in the United States, with 1976 sales in the United States of approximately $2.6 million.

17. At all times relevant herein, Miles has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V. TRADE AND COMMERCE

18. For purposes of this complaint, the relevant product market is the manufacture and sale of allergenic extracts and the relevant geographic market is the United States.

19. Allergenic extracts are used primarily in the diagnosis and immuno-therapeutic treatment of allergies.

20. Sales of allergenic extracts in the United States are substantial. Sales are estimated to be $18 million in 1976.

21. Prior to the aforesaid acquisition, Miles and respondents were substantial and actual competitors in the manufacture and sale of allergenic extracts.

22. At the time of the aforesaid acquisition, respondents through Cutter, and Miles ranked approximately first and third respectively in total sales of all allergenic extracts manufacturers. Of total sales in the allergenic extracts industry at the time of the acquisition, respondents accounted for an estimated 35–40 percent and Miles accounted for an estimated 12 percent.

23. The allergenic extracts market is concentrated. It is estimated that in 1976, the four top ranking firms accounted for more than 70 percent of domestic sales.

24. In 1976, there were seventeen companies licensed by the Bureau of Biologics, Food and Drug Administration, that were engaged in the manufacture and sale of allergenic extracts. Of those, three companies sold allergenic extracts nationwide, including respondents and Miles. The remaining companies were either local or regional sellers.

25. Concentration is high in the allergenic extracts industry, notwithstanding a growing market and the existence of small companies.

26. Entry into the manufacture and sale of allergenic extracts is difficult, requiring significant financial resources, sophisticated technological skills, quality control and effective marketing, distribution and servicing.

VI. EFFECTS OF ACQUISITION; VIOLATIONS CHARGED

27. The effects of the acquisition of Miles by respondents may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of allergenic extracts in the United States in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

a. Actual and potential competition between respondents and Miles in the manufacture and sale of allergenic extracts has been or may be eliminated;

b. Miles as a substantial, independent competitive factor in the manufacture and sale of allergenic extracts has been eliminated;

c. The leading position of respondents in the manufacture and sale of allergenic extracts may be further entrenched;

d. Concentration in the manufacture and sale of allergenic extracts will be maintained or increased, and the possibility of deconcentration may be diminished;

e. Existing barriers to new entry may be increased substantially;

f. Additional acquisitions and mergers in the industry may be encouraged;

g. Independent manufacturers and sellers of allergenic extracts may be deprived of a fair opportunity to compete with the combined resources and market position of respondents and Miles;

h. Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the manufacture and sale of allergenic extracts.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Clayton and Federal Trade Commission Acts; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Bayer AG is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located in the City of Leverkusen, Federal Republic of Germany.

Respondent Rhinechem Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 425 Park Ave., in the City of New York, State of New York.

Respondent Miles Laboratories, Inc. (formerly Rhinechem Laboratories, Inc.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1127 Myrtle St., in the City of Elkhart, State of Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definition shall apply:

"Allergenic Extracts" are biological products that are administered to man primarily for the diagnosis or treatment of allergies.

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondents, through their officers, directors, employees, subsidiaries, affiliates, divisions, successors and assigns, whether direct or indirect, shall within one (1) year from the date on which this order becomes final divest absolutely and in good faith all United States assets (other than items which cannot be moved without substantial injury to the premises), of whatever description acquired by respondents as a result of their acquisition of Miles Laboratories, Inc. (Miles), as well as subsequent additions and improvements thereto, and primarily utilized by Miles in the manufacture, distribution or sale in the United States of Allergenic Extracts. Such assets shall include equipment, machinery, raw material reserves, inventory, a list of customers, product trade names, product trademarks, patents, assignable licenses (non-assignable licenses shall be relinquished), manufacturing specifications and procedures, market research materials, sales training materials, research and development projects (including licenses, license applications and Notices of Claimed Investigational Exemption for a New Drug (IND's)), and such other property of whatever description relating primarily to Miles Allergenic Extracts. Such divestiture shall be made to a third party which represents that it intends to use such assets in the manufacture, distribution or sale of Allergenic Extracts in the United States.

II

It is further ordered, That, upon the written request of the acquirer of the divested property, respondents shall, for no longer than three (3) years from the date of the agreement with a third party to transfer the assets referred to in Paragraph I, furnish such technical, market and quality control information of Miles and make available such personnel and technical assistance as may be necessary to enable such acquirer to manufacture and market those Allergenic Extracts manufactured in the United States by Miles at the time of its acquisition by respondents.

III

It is further ordered, That, pending the divestiture required by this order, respondents shall not cause, and shall use their best efforts to prevent, any diminution of the value of the Miles Allergenic Extracts products or assets.

IV

It is further ordered, That, pursuant to the requirements of Paragraph I above, none of the Miles Allergenic Extracts assets shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee or agent of, or under the control, direction or influence of, respondents or any of respondents' subsidiaries or affiliated corporations, whether direct or indirect, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of any respondent.

V

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent, its subsidiaries, affiliates, divisions, successors or assigns, shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire any stock, share capital, or equity interest in any concern, corporate or noncorporate, engaged in, or the assets of such concern relating to, the manufacture, distribution or sale in the United States of Allergenic Extracts; *provided, however,* that the foregoing provision shall not prohibit, with respect to Allergenic Extracts, (1) the taking by respondents from such concerns of non-exclusive licenses that contain no restrictions with respect to limiting other market entrants, and (2) purchases in the ordinary course of business which do not result in the elimination of a competitor.

VI

It is further ordered, That, for a period of five (5) years from the date this order becomes final, no respondent, its subsidiaries, affiliates, divisions, successors or assigns, shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire any stock, share capital or equity interest in any concern, corporate or noncorporate, engaged in, or the assets of such concern relating to, the manufacture, distribution or sale in the United States of chemically treated diagnostic reagent strips used for in vitro quantitative urinalysis; *provided, however,* that the foregoing provision shall not prohibit, with respect to such strips, (1) the taking by respondents from such concerns of non-exclusive licenses that contain no restrictions with respect to limiting other market entrants, and (2) purchases in the ordinary course of business which do not result in the elimination of a competitor.

VII

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, and every sixty (60) days thereafter until respondents have fully complied with the divestiture provision of this order, and annually thereafter, on the anniversary date of service of this order, for the duration of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which each or every respondent intends to comply, is complying or has complied with this order. Until divestiture is accomplished, all compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the disposition of the assets specified in Paragraph I of this order, the identity of all such persons and copies of all written communications between such persons and any respondent.

VIII

It is further ordered, That respondents notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance obligations arising out of the order.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

Docket 8917. Interlocutory Order, Jan. 17, 1980

ORDER DENYING RESPONDENT BRISTOL-MYERS' MOTION FOR ADDITION OF PORTION OF APPENDICES TO BRIEF ON APPEAL

By motion dated January 7, 1980, respondent Bristol-Myers Company ("Bristol-Myers") requests that the Commission accept 18 pages of appendices as part of its appeal brief in this proceeding. The 18 pages concerned here represent the amount by which Bristol-Myers' 77 page main appeal brief and 31 page booklet of appendices exceed the 90 page limit on appeal briefs set by the Commission in its Order Granting Leave to File Briefs in Excess of Sixty Pages, dated November 9, 1979.

Bristol-Myers has already asked the Commission to reconsider its 90 page limit and to permit lengthier briefs. The Commission denied that request by order dated November 29, 1979. Thus, Bristol-Myers has long been on notice that the 90 page limit is firm. However, in its latest motion, Bristol-Myers provides no reason for exceeding that limit other than the difficulty of paring down its discussion of the case to the required length. Bristol-Myers' motion is therefore denied.

The Commission is nevertheless willing to grant Bristol-Myers an additional period within which to edit its appendices or main appeal brief, or both, in such a manner that the combined filing does not exceed ninety pages. If Bristol-Myers fails to submit a revised brief or revised appendices within that period, the Commission shall accept the first 13 pages of Appendix A to Bristol-Myers' appeal brief and shall reject the remainder of Appendix A and the entirety of Appendix B.

To assure complaint counsel adequate opportunity to respond to any such revisions as Bristol-Myers may make, the remainder of the briefing schedule must be readjusted. Accordingly,

It is ordered, That:

(1) Bristol-Myers' motion to have the final 18 pages of Appendices A and B accepted as part of its appeal brief is denied;

(2) Bristol-Myers is granted leave until and including January 28, 1980, in order to withdraw its main appeal brief and appendices and to revise them such that they total no more than 90 pages;

(3) If no such revisions are submitted before January 28, 1980, the Secretary shall remove pages A-14 through B-11 of Appendices A and B to Bristol-Myers' main appeal brief before placing such appendices on the public record and transmitting them to the Commission; and

(4) The briefing schedule shall be revised as follows: all answer

briefs shall be filed on or before March 17, 1980; and all reply briefs shall be filed on or before March 31, 1980.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

MONTGOMERY WARD & COMPANY, INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3006. Complaint, Jan. 24, 1980—Decision, Jan. 24, 1980

This consent order requires, among other things, a Chicago, Ill. firm, engaged in the operation of a chain of department and catalog stores, to cease making unsubstantiated safety-related claims regarding the installation, operation or maintenance of woodburning heaters and Franklin fireplaces; or any representation that contradicts the requirements of prevailing model building or fire protection codes. Respondent is required to include in its catalogs a conspicuous notice providing minimum distances from adjacent walls at which heating devices can be safely and properly installed; and advising consumers that such information has been previously misstated; that improperly installed heating devices are fire hazards and should be immediately relocated; and that respondent, at its own expense, will reinstall improperly installed heaters and provide shields for previously purchased Franklin fireplaces. Additionally, the company is required, within six months, to revise and reprint promotional and instructional material so as to comply with the terms of the order, and provide its sales personnel with corrected installation information.

Appearances

For the Commission: *William C. Holmes.*

For the respondent: *William J. Thompson*, Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Montgomery Ward & Co., Incorporated, a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. Respondent

PARAGRAPH 1. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal executive offices located at Montgomery Ward Plaza, Chicago, Illinois.

PAR. 2. Respondent, one of the world's largest merchandising organizations, sells a broad range of merchandise lines through its nationwide mail-order catalog business and through retail stores located throughout the United States.

II. Products

PAR. 3. Among the products sold and offered for sale by respondent through its mail-order catalogs and retail stores are "woodburning heaters" and "Franklin fireplaces." These devices burn wood or other solid fuel as a means of heating the rooms in which the devices are placed. Examples of such devices include the "pot belly stove," the "parlor heater," the "comfort heater," the "circulating wood heater" and the "Franklin-style fireplace."

III. Jurisdiction

PAR. 4. In the course and conduct of its aforesaid business, respondent has caused such woodburning heaters and Franklin fireplaces to be advertised, sold, transported and shipped across state lines. Respondent has thereby, at all times relevant to this complaint, maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

IV. Violations

A. Count I

PAR. 5. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made false representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed.

Among and typical, but not all inclusive, of such false representations are the following:

1. Respondent has represented to consumers, in written advertisements and in written materials packaged with the products, directly or by implication, that five of its Franklin fireplaces (models 21015, 21017, 21335, 21336 and 21337) can be safely and properly installed as close to adjacent combustible walls as 18 inches at the backs of the devices without installing a special protective heat shield between the devices and the combustible walls. However, product safety tests applicable to these devices performed before such representations by respondent

were made determined that minimum safe clearances for these fireplaces from adjacent combustible walls are 18 inches at the backs of the devices with a special protective heat shield installed between the devices and the combustible walls. Moreover, respondent was aware or should have been aware of the results of these tests before the aforementioned representations were made.

2. Respondent has represented to consumers, in written advertisements and in written materials packaged with the product, directly or by implication, that one of its woodburning heaters (model 7366) can be safely and properly installed as close to adjacent combustible walls as 18 inches at the back of the device. However, this heater is of a type which, in the opinion of experts, and according to building and fire protection codes in effect in numerous states, counties and municipalities throughout the United States, should not be installed closer than 36 inches from adjacent combustible walls.

3. Respondent has represented to consumers, in written advertisements and in oral sales presentations by its sales personnel, directly or by implication, that two more of its woodburning heaters (models 7377 and 7387) can be safely and properly installed as close as 24 inches from adjacent combustible walls. However, product safety tests conducted by respondent's own Merchandise Testing Laboratories before these representations were made determined that minimum safe clearances from combustible walls for these two devices are 30 inches at the backs of the devices and 36 inches at the sides.

4. Respondent has represented to consumers in written advertisements, directly or by implication, that still another of its woodburning heaters (model 5722) can be safely and properly installed as close as 24 inches from adjacent combustible walls. However, product safety tests performed by the manufacturer of this model and by Underwriters Laboratories, Inc. determined that minimum safe clearances from combustible walls for model 5722 are 36 inches at the back of the device and 30 inches at the sides. Moreover, respondent was aware of the results of these tests before the aforementioned representations were made.

5. Respondent has represented to consumers in a free promotional booklet mailed to prospective purchasers that its Franklin fireplaces can be safely and properly installed as close as 12 inches at the sides of the devices from adjacent combustible walls. However, product safety tests on at least two of respondent's Franklin fireplaces (models 21015 and 21017) have determined that safe and proper clearance requirements at the sides of these devices are 36 inches—not 12 inches.

Par. 6. The false representations by respondent referred to in Paragraph Five above have the tendency and capacity to:

1. Cause consumers to install woodburning heaters and Franklin fireplaces at insufficient and unsafe distances from adjacent combustible walls, thereby subjecting consumers to potential fire loss and risks of personal injury and property damage.

2. Induce consumers into ordering woodburning heaters and Franklin fireplaces under the assumption that such devices can be safely and properly installed according to the representations contained in written advertisements and other promotional materials and presentations used by respondent to induce sales of such devices.

PAR. 7. The false representations by respondent referred to in Paragraph Five above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

B. Count II

PAR. 8. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made contradictory representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed.

Among and typical, but not all inclusive, of such contradictory representations are the following:

1. Respondent has made contradictory representations to consumers in written materials packaged by respondent with three of its woodburning heaters (models 7366, 7386 and 7396) concerning the safe and proper installation of these devices. Diagrams contained in these written materials show proper clearances from adjacent combustible walls for these three devices as being 24 inches at the backs of the devices and 30 inches at the sides. However, printed instructions that appear immediately below the diagrams state that these devices should be installed with clearances from combustible walls of 18 inches at the backs of the devices and 36 inches at the sides.

2. Respondent has represented to consumers in written advertisements, directly or by implication, that four more of its woodburning heaters (models 7326, 7336, 7377 and 7387) may be safely and properly installed as close as 24 inches from adjacent combustible walls. However, in the written materials packaged by respondent with these four devices, respondent has informed consumers that these devices should be installed with clearances from combustible walls of at least 30 inches at the backs of the devices and 36 inches at the sides.

PAR. 9. The contradictory representations by respondent referred to in Paragraph Eight above have the tendency and capacity to:

1. Confuse consumers into installing woodburning heaters and Franklin fireplaces at insufficient and unsafe distances from adjacent combustible walls, thereby subjecting consumers to potential fire loss and risks of personal injury and property damage.

2. Induce consumers into ordering woodburning heaters and Franklin fireplaces under the assumption that such devices can be safely and properly installed according to the representations contained in written advertisements and other promotional materials used by respondent to induce sales of such devices.

PAR. 10. The contradictory representations by respondent referred to in Paragraph Eight above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

C. Count III

PAR. 11. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made unsubstantiated representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed, where such representations have lacked a prior reasonable, scientific basis.

Among and typical, but not all inclusive, of such scientifically unsubstantiated representations are the following:

1. The false representations referred to in Paragraph Five above involving models 21015, 21017, 21335, 21336, 21337, 7377, 7387 and 5722 not only lacked prior scientific substantiation but were even contradicted by actual scientific tests conducted before the representations were made.

2. The false representations referred to in Paragraph Five above involving model 7366, and the contradictory representations referred to in Paragraph Eight above involving models 7366, 7386, 7396, 7326 and 7336, were made without prior scientific substantiation, since respondent was and is aware of no scientific tests conducted on these models to substantiate such representations.

3. Respondent has represented to consumers in written advertisements, directly or by implication, that another of its woodburning heaters (model 5718), can be installed as close as 24 inches from adjacent combustible walls. However, not only were these representations made without prior scientific substantiation; these representations contradicted the results of prior scientific tests on a comparable model, and of which respondent was aware, in which it was found that minimum safe clearances from combustible walls for the comparable

model were 36 inches at the back of the device and 30 inches at the sides.

PAR. 12. The scientifically unsubstantiated representations referred to in Paragraph Eleven above:

1. Involve specific claims concerning the safe usage of potentially hazardous consumer products.

2. Involve potential personal injury and property damage in the event that the representations are false.

3. Are of a type that consumers cannot themselves verify, since they lack the necessary equipment and expertise.

PAR. 13. The scientifically unsubstantiated representations referred to in Paragraph Eleven above contradict and offend model building, mechanical and fire protection codes recommended by the International Conference of Building Officials, the American Insurance Association, the Southern Building Code Congress, and the National Fire Protection Association. These model codes, which have been adopted by numerous states, counties and municipalities throughout the nation, require either that devices such as respondent's woodburning heaters and Franklin fireplaces, models 7326, 7336, 7366, 7377, 7387, 21015, 21017, 21335, 21336 and 21337, be specifically and scientifically tested to establish minimum safe clearances for the devices from adjacent combustible walls, or, in the absence of such tests, that such devices be installed with clearances of at least 36 inches from adjacent combustible walls.

PAR. 14. Certain insurance companies look to the aforementioned model codes when determining the insurability of private dwellings. If a home owner fails to comply with the requirements of such model codes, such insurance companies may, as applicable, either refuse to grant a home owner's policy to the home owner or cancel the home owner's existing policy.

PAR. 15. In light of factors such as those referred to in Paragraphs Twelve through Fourteen above, the representations by respondent referred to in Paragraph Eleven above were unfair and deceptive, since they were made without a prior reasonable basis and, in particular, without prior adequate scientific substantiation.

PAR. 16. The representations by respondent referred to in Paragraph Eleven above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

D. Count IV

PAR. 17. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has, as described in Counts I, II and III above, made representations to consumers concerning the safe and proper usage of potentially dangerous consumer products, where such representations have been false, contradictory and/or scientifically unsubstantiated. A continuing and lingering effect of such representations is the danger that, where such representations were in fact false and unsafe, consumers who have already installed such devices in accordance with such representations will, unless notified otherwise, continue to be exposed to unreasonable risks of personal injury and property damage.

Par. 18. It is an unfair or deceptive act or practice for respondent to continue to fail to:

1. Notify past purchasers of the dangers created by reliance upon those representations already shown to be false by actual scientific tests and expert opinion (see Count I above).
2. Conduct adequate scientific tests to assess the safety of those representations respecting which scientific tests have not yet been conducted (see Count III above), and notify past purchasers of any safety hazards disclosed by such tests and involving respondent's representations.

Par. 19. Respondent's continuing failure to give the notices to past purchasers referred to in Paragraph Eighteen above constitutes an unfair act or practice in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

E. Count V

Par. 20. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made false or deceptive representations to consumers concerning the applicability and results of third party product tests, listing and approvals.

Among and typical, but not all inclusive, of such false or deceptive representations are the following:

1. Respondent has represented to consumers, in written materials and in oral sales presentations by its sales personnel, that five of its Franklin fireplaces (models 21015, 21017, 21335, 21336 and 21337) have been "listed" and approved under International Conference of Building Officials ("ICBO") research reports for installation as close to adjacent combustible walls as: 12 inches at the backs of the devices if a special protective heat shield is used; or 18 inches if the heat shield is not used. In actuality, however, the ICBO research reports applicable to these devices require that they be installed with the heat shield

(never without the heat shield) and be installed at least 18 inches (not 12 inches) from combustible walls.

2. Respondent has represented to consumers in written advertisements that one of its woodburning heaters (model 5722) has been "listed" and approved by Underwriters Laboratories, Inc. ("UL") for installation as close as 24 inches from combustible walls. In actuality, however, the UL listing for model 5722 requires that for the device to be listed, minimum safe clearances "must" be maintained from adjacent combustible walls of "not less than . . . 36 inches at back of cabinet, 30 inches at sides."

PAR. 21. Consumers rely upon UL and ICBO listings and other third party products tests, listings and approvals when choosing consumer products.

PAR. 22. State, county and municipal building officials rely upon UL and ICBO listings when determining whether devices such as respondent's woodburning heaters and Franklin fireplaces satisfy the requirements of local building and fire protection codes.

PAR. 23. The representations referred to in Paragraph Twenty above have the tendency and capacity to mislead and deceive consumers and state, county and municipal building officials as to the applicability and results of third party product tests, listings and approvals, and have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal executive offices located at Montgomery Ward Plaza, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Montgomery Ward & Co., Incorporated (hereinafter "respondent"), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or distribution in or affecting commerce of any woodburning heaters or Franklin fireplaces, forthwith cease and desist from, directly or indirectly:

A. Making any representation to consumers regarding the safe or proper installation clearances for any woodburning heater or Franklin fireplace from adjacent combustible walls, where such representation contradicts the general clearance requirements from combustible walls contained in prevailing model building, mechanical and fire protection codes, unless prior to the time such representation is first made, respondent possesses and relies upon a competent scientific test which substantiates such representation. *Provided*, that for purposes of this order, a "competent scientific test" shall mean:

> A test in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the profession to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, or (b) with the exception of the specific tests required by Paragraph III.A below, by persons

employed by respondent, if they are qualified by professional training, education and experience and can conduct and evaluate the test in an objective manner.

B. Making any safety-related representation to consumers regarding the installation (other than clearances from adjacent combustible walls), operation or maintenance of any woodburning heater or Franklin fireplace, unless prior to the time such representation is first made, respondent possesses and relies upon competent and reliable evidence which substantiates such representation, including but not limited to competent scientific tests or competent and reliable opinions of scientific, engineering or other experts, including employees of respondent, who are qualified by professional training or experience to render competent judgments in such matters.

C. Making any representation to consumers regarding any woodburning heater or Franklin fireplace, which misstates or misrepresents the results or applicability of any test, listing or approval by any third party.

II.

It is further ordered, That respondent shall include as a full page located in the center of its October 1979 catalog house clearance books, and as a full page located immediately preceding the first page of the Index in its Spring & Summer 1980 semi-annual general catalog, the following notice, conspicuously displayed:

IMPORTANT SAFETY NOTICE TO OWNERS OF WARDS WOODBURNING HEATERS AND FRANKLIN FIREPLACES

Some recent Wards catalogs, fireplace booklets, descriptive manuals, owner's guides, or sales person statements understated some of the minimum recommended clearances between some Wards woodburning heaters and Franklin fireplaces and adjacent combustible walls (see the list of model numbers below). If you purchased one of these heaters or fireplaces and installed it closer to combustible walls than the distances shown in the chart below, it should be relocated IMMEDIATELY. Failure to relocate the heater or fireplace to these distances, or (if needed) to install a protective heat shield between it and combustible walls, COULD CAUSE A FIRE.

CLEARANCES FOR MODELS 5722, 7377, 7387, 21015 AND 21017:

STOVE MODEL	DISTANCE FROM REAR	DISTANCE FROM SIDES
5722 (Circulating wood heater)	36 inches from back of stove	30 inches from sides of stove
7377 (Comfort heater)	30 inches from back of stove	36 inches from sides of stove

7387 (Parlor heater)	30 inches from back of stove	36 inches from sides of stove
21015 (Franklin fireplace)	18 inches from back of fireplace, with heat shield installed on the inside back wall of fireplace	36 inches from sides of firebox opening
21017 (Franklin fireplace)	18 inches from back of fireplace, with heat shield installed on the inside back wall of fireplace	36 inches from sides of firebox opening

If you have installed one of the above heaters or fireplaces at less than the distances from combustible walls shown above, or without a heat shield where a heat shield is needed, Wards will help you by either relocating the heater or fireplace to the correct distance or by providing or installing the heat shield, at Wards' expense.

CLEARANCES FOR MODELS 21335, 21336 AND 21337:

STOVE MODEL	DISTANCE FROM REAR	DISTANCE FROM SIDES
"Little Ben" Franklin fireplace (Wards model 21335; Hearth Craft model 220)	18 inches from back of fireplace, with heat shield installed on back of fireplace	12 inches from sides of cast iron hearth
"Big Ben" Franklin fireplace (Wards model 21336; Hearth Craft model 260)	18 inches from back of fireplace, with heat shield installed on back of fireplace	12 inches from sides of cast iron hearth
"Giant Ben" Franlkin fireplace (Wards model 21337; Hearth Craft model 300)	18 inches from back of fireplace, with heat shield installed on back of fireplace	12 inches from sides of cast iron hearth

If you have purchased one of the above three Franklin fireplaces from Wards and installed it without a heat shield, Wards will provide or install a heat shield at Wards' expense.

FOR FURTHER INFORMATION, write:

Mr. Donald C. Gutmann,
Customer Relations Manager, 4-N
Montgomery Ward & Co., Incorporated
Montgomery Ward Plaza
Chicago, Illinois 60671

To enable us to assist you promptly, please try to include the following information in your letter, if known: your name, address and telephone number, the unit you own, the distance from the back and sides of your unit to adjacent combustible walls, whether your unit is installed with a heat shield, and the address where your unit is located."

III.

It is further ordered, That:

A. Respondent shall promptly submit the following of its models of woodburning heaters to one or more independent product testing laboratories approved for this purpose by the Federal Trade Commission or its delegees, for determination by competent scientific tests, as defined in Paragraph I.A above, of the minimum recommended installation clearances for such models from adjacent combustible walls: models 5718, 7326 and 7336, as offered in respondent's Spring & Summer 1978 catalog, and models 7366, 7386 and 7396, as offered in respondent's Fall & Winter 1977 catalog.

B. If the results of the tests required by Paragraph III.A above on respondent's models 5718, 7326, 7336, 7366, 7386 and 7396, show that respondent has understated the minimum recommended clearances for any such model from adjacent combustible walls, in any of its current or past catalogs, fireplace booklets, descriptive manuals or owner's guides, respondent shall include in the notice required by Paragraph II above notification of the clearances determined by such test and an offer to relocate the model to such clearances at respondent's expense.

IV.

It is further ordered, That respondent shall take all such steps as are necessary to carry out its obligations described in the notice required by Paragraphs II and III.B above to relocate certain woodburning heaters and Franklin fireplaces, or provide or install protective heat shields where needed, at respondent's expense. *Provided*, that:

A. Respondent may, at its election, have the necessary work performed by persons selected by it, including its own employees, who are competent to perform such work.

B. Respondent shall, if relocation of a particular heater or fireplace, or installation of the necessary heat shield on its Franklin fireplace models 21335, 21336 and 21337, is not acceptable to the consumer, offer instead to remove the unit, refund the full purchase price paid by the consumer for the unit (including shipping and handling charges), and make reasonable repairs to the consumer's premises necessitated by such removal, at respondent's expense.

C. Respondent may, at its election, if it concludes that relocating a particular heater or fireplace, or installing the necessary heat shield on its Franklin fireplace models 21015, 21017, 21335, 21336 or 21337, would not be feasible, instead offer to remove the unit, refund the full purchase price paid by the consumer for the unit (including shipping and handling charges), and make reasonable repairs to the consumer's premises necessitated by such removal, at respondent's expense.

D. Respondent may, as regards its Franklin fireplace models 21335, 21336 and 21337, require the consumer to submit proof of purchase satisfactory to respondent showing that the consumer purchased his or her unit from respondent, before respondent must approve any remedy under this order for said consumer, which approval by respondent shall not be unreasonably withheld.

V.

It is further ordered, That:

A. Respondent shall send to each of its retail sales departments involved in the sale of any woodburning heater or Franklin fireplace, prior to or contemporaneously with the selling of such item in that department, descriptive manual pages or other written information for the department's sales personnel setting forth the clearance requirements from adjacent combustible walls, and the heat shield requirements, if any, for the installation of that item.

B. For a period of six (6) months from the effective date of this order (plus such additional time as may be necessary to conduct competent scientific tests and to print the materials), respondent shall send to all company retail and catalog stores, as available based upon competent scientific tests, written point of sale material for distribution to consumers inquiring about any of the woodburning heaters or Franklin fireplaces which are covered by the notice requirements of Paragraphs II and III.B of this order, and which respondent is then offering for sale to consumers, setting forth the clearance requirements from adjacent combustible walls, and the heat shield requirements, if any, for the installation of such items.

VI.

It is further ordered, That respondent shall have a period of six (6) months from the effective date of this order to revise and reprint all printed materials as required to comply with this order, including but not limited to owner's guides, advertising copy, catalog copy and descriptive materials, and shall not be in violation of this order because of the existence of owner's guides packaged with products prior to the effective date of this order. *Provided*, that during such period, respondent shall use its best efforts to advise customers and consumers of the installation information contained in the notice required by Paragraphs II and III.B above of this order, and to include with the woodburning heaters and Franklin fireplaces covered by such notice corrected installation information concerning recommended clearances from adjacent combustible walls.

VII.

It is further ordered, That respondent shall:

A. Sixty (60) and two hundred forty (240) days after the effective date of this order, file with the Commission reports in writing setting forth in detail the manner and form in which it has complied with this order.

B. Maintain files of all persons making written requests to respondent to have woodburning heaters or Franklin fireplaces covered by the notice required by Paragraphs II and III.B of this order relocated, or installed or provided with heat shields, where respondent has refused such requests, which files shall contain the names and addresses of such persons and the information on which each such refusal was based, including all correspondence from the consumer concerning the consumer's request. Such files shall be made available for inspection and copying, upon reasonable notice, by a duly authorized agent of the Commission during respondent's regular business hours.

C. Forthwith distribute a copy of this order to each of its operating divisions which is involved in the sale or offering for sale of, or the selection, evaluation or preparation of materials regarding, woodburning heaters or Franklin fireplaces.

D. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

Docket 8917. Interlocutory Order, Jan. 29, 1980

ORDER DENYING RESPONDENT BRISTOL-MYERS' MOTION THAT THE COMMISSION TAKE OFFICIAL NOTICE OR THAT IT REOPEN THE RECORD

On November 26, 1979, respondent, Bristol-Myers Company, ("Bristol-Myers") filed a motion requesting the Commission to take official notice of selected newspaper reports about the initial decision in this case, or reopen the record so those reports could be introduced into evidence. Bristol-Myers contends that these reports have misstated the findings made by the administrative law judge, demonstrating that the press has misunderstood not only the tenor of the initial decision, but also the affirmative disclosures which Bristol-Myers has been ordered to include in its comparative advertising. The respondent argues that the reports consequently provide direct evidence of the likelihood that consumers will also misconstrue the affirmative advertising disclosures. Complaint counsel answered Bristol-Myers' motion on December 3, 1979, opposing it on grounds that the newspaper reports are neither reliable nor probative evidence of consumers' understanding of the affirmative disclosures.

At this point in the proceedings at least, we are not persuaded of a need either to notice the proferred clippings officially or to reopen the record for the introduction into evidence. The newspaper reports seem, in fact, to be only dimly relevant to the issue of consumer perceptions. The respondent's motion does not state that newspapers have generally mischaracterized the affirmative disclosures which would be given to consumers; rather the motion asserts only that the press has misconstrued the findings on which the order of the administrative law judge is based. On the other hand, we also note from the motion that one of the respondent's witnesses has already testified directly about the probable impact on consumers of affirmative disclosures that are similar or identical to those set forth in the initial decision. Therefore, it is not apparent that the selected newspaper reports constitute evidence necessary or helpful to a proper resolution of this case.[1] Accordingly,

It is ordered, That Bristol-Myers' motion be and hereby is denied.

Commissioner Pitofsky did not participate.

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[1] The Commission may at any time take official notice of appropriate material on its own motion. Pursuant to Rule 3.43(d), however, parties are entitled to disprove an officially noticed fact if the Commission's decision is based on it, in whole or in part, and it is a material fact that does not appear in evidence of record.

IN THE MATTER OF

THE HARTZ MOUNTAIN CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(A) OF THE CLAYTON ACT

Docket C-3008. Complaint, Jan. 31, 1980—Decision, Jan. 31, 1980

This consent order requires, among other things, a Harrison, N.J. manufacturer of pet supplies to cease entering into any agreement or arrangement having the tendency to fix resale prices for pet products, or restrict interbrand and intrabrand competition in the pet supply industry. The firm is specifically prohibited from entering into any exclusive or preferential dealing arrangements; and using price incentives, refusals to deal, and threats of termination to induce and maintain such arrangements. Respondent is further prohibited from engaging in price discrimination; restricting sales territories and allocating customers; disparaging financial status of competitors or disfavored distributors; suggesting resale prices for pet supplies; and refusing to deal with recalcitrant distributors. Respondent is additionally required to publish the terms of the order in the *Supermarket News*, and maintain specified records for a designated period.

Appearances

For the Commission: *Thomas D. Massie, Peggy H. Summers, William C. Holmes* and *Jerome S. Lamet.*

For the respondent: *Joshua F. Greenberg, Kaye, Scholer Fierman, Hays & Handler,* New York City.

COMPLAINT

The Federal Trade Commission having reason to believe that The Hartz Mountain Corporation has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C 45) and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges as follows:

Definitions

1. As used in this complaint:

(a) "Pet supply" means a product that is utilized in the everyday maintenance, care and enjoyment of common household pets and includes, but is not limited to, such items as pesticidal collars, shampoos, medicinals, rawhide and rubber chewing toys, leashes, feeding dishes, books, bird and small animal cages, cat litter, aquariums, aquarium pumps, heaters, filters and ornaments, dog and cat treats and biscuits, small animal treats, pet and wild bird seed, fish foods and aquarium remedies.

(b) "Manufacturer" means any person engaged in production, assembly or packaging of pet supplies or which causes production, assembly or packaging of pet supplies to be done for it. The term manufacturer shall not include any person engaged primarily as a retailer which uses its own trademark in connection with pet supplies.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal business entity.

Respondent

2. The Hartz Mountain Corporation (hereinafter referred to as Hartz Mountain or respondent) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 700 South Fourth St., Harrison, New Jersey.

Nature of Respondent's Business

3. Hartz Mountain is primarily engaged in the business of manufacturing, distributing and selling approximately 1200 pet supply items under the Hartz, Hartz Mountain, Delta and Longlife brand names. It is the largest manufacturer and distributor of pet supplies in the United States. It is also engaged in the business of distributing and selling live pets such as tropical fish, goldfish, birds, small mammals and reptiles. It has major pet supply manufacturing, warehousing and distribution facilities in Harrison, Bloomfield and Jersey City, New Jersey.

4. Hartz Mountain's total sales, including live pets, were approximately $180,000,000 in 1975. Its sales of pet supplies accounted for approximately $163,800,000 during that period.

5. Hartz Mountain distributes its brands of pet supplies to over 50,000 retail outlets primarily through a distribution system of independent service distributors, who are sometimes referred to as rack jobbers, and wholesale distributors, both of whom purchase and warehouse pet supplies for resale to retailers. In addition, service distributors usually provide services ancillary to the sale of pet supplies, such as setting up displays and fixtures, preticketing individual products with prices designated by a retailer, delivering to individual retail outlets, stocking the displays or fixtures with less than

case lots, setting up promotions and floor displays, cleaning and otherwise maintaining the displays or fixtures, and removing damaged, shopworn and slow moving pet supplies. In a number of instances, Hartz Mountain sells directly to retailers, either by shipping merchandise directly to the retailer from its New Jersey facilities or through one of its branches located in various parts of the United States; its principal method of distribution, however, is through service distributors.

6. Hartz Mountain maintains a sales force whose personnel are located throughout the United States. These sales personnel call on distributors and retailers carrying Hartz Mountain's brands of pet supplies, regardless of whether such customers purchase directly from respondent or from one of its distributors, for the purpose of introducing new pet supply products, offering suggestions and advice on merchandising respondent's products, advising such distributors and retailers of promotions that are or will be available, and resolving problems and maintaining relations with such customers. In addition, respondent's sales personnel actively solicit new accounts.

Commerce

7. The pet supplies manufactured and distributed by respondent have been and are being sold by Hartz Mountain to purchasers thereof located throughout the several States of the United States and in the District of Columbia. Respondent has caused and is causing such pet supplies to be transported and shipped from the various places of manufacture and warehousing to purchasers thereof who are located in states other than the state where such pet supplies have been and are being manufactured and warehoused. At all times relevant herein, Hartz Mountain was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. 44), and was engaged in commerce as "commerce" is defined in the Clayton Act, as amended (15 U.S.C. 12).

8. Except to the extent that competition has been hindered, frustrated and restrained as set forth hereafter, Hartz Mountain has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, distribution and sale of pet supplies in and affecting "commerce" as that term is defined in the Federal Trade Commission Act and in "commerce" as that term is defined in the Clayton Act, as amended.

COUNT I

9. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count I as if fully written herein.

Nature of the Violation

10. In the course and conduct of its business in and affecting commerce Hartz Mountain has:

(a) Engaged in a course of conduct to hinder, frustrate and restrain the distribution of competitive brands of pet supplies by certain distributors and retailers. In furtherance of such course of conduct it has:

(1) Entered into and enforced agreements, understandings or arrangements with certain distributors and retailers whereunder such distributors and retailers would refrain from the purchase of pet supply products of manufacturers other than Hartz Mountain;

(2) Granted special rebates, discounts, guaranteed or subsidized profits, and other monetary incentives and modifications in price to certain retailers as an inducement for such retailers to refrain from the purchase of pet supply products from competitors of Hartz Mountain; and

(b) Knowingly made or caused to be made false reports and statements concerning the financial status of certain distributors and competitors, including statements indicating that such distributors or competitors were about to go out of the pet supply business.

Effects

11. The aforesaid acts and practices of the respondent have the tendency to or the actual effect of:

(a) Hindering, frustrating and restraining the ability of competitors to gain distribution of their brands of pet supplies; and

(b) Impairing the credibility and business reputation of certain competitors, thereby impairing their ability to compete with respondent.

Violation Alleged

12. The acts and practices of the respondent as set forth in Paragraph 10 above constitute unfair methods of competition and restrain trade in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

13. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count II as if fully written herein.

Nature of the Violation

14. In the course and conduct of its business in and affecting commerce Hartz Mountain has engaged in a course of conduct to limit the freedom of certain of its distributors to resell its products. In furtherance of such course of conduct Hartz Mountain has:

(a) Entered into and enforced contracts, agreements, understandings or arrangements with certain of its distributors requiring that they resell respondent's products only on a service basis. Such distributors are required to provide, replenish, clean and remove respondent's products at the point of display, over and above the actual sale of such products. Such distributors are precluded from selling respondent's products to retailers who wish to purchase such products without receiving such ancillary services.

(b) Entered into and enforced agreements, understandings or arrangements with certain distributors forbidding such distributors from soliciting or selling to retailers who purchase respondent's products from another distributor.

Effects

15. The aforesaid acts and practices of the respondent have the tendency to or the actual effect of:

(a) Depriving certain distributors of their freedom to solicit customers and to tailor their sales to the desires and needs of such customers; and

(b) Allocating customers among certain distributors and eliminating intrabrand competition in the resale of respondent's products by distributors thereof, and depriving retailers and consumers of the benefits of competition between such distributors.

Violation Alleged

16. The acts and practices of the respondent as set forth in Paragraph 14 above constitute unfair methods of competition and restrain trade in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

17. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count III as if fully written herein.

Nature of the Violation

18. In the course and conduct of its business in and affecting commerce Hartz Mountain has engaged in a course of conduct, the purpose or effect of which has been to fix, control, establish and maintain the prices at which its products are promoted, offered for sale and sold by certain distributors. In furtherance of such course of conduct Hartz Mountain has:

(a) Entered into and enforced agreements, understandings or arrangements with certain distributors requiring that they sell at prices established or suggested by respondent for its products;

(b) Refused to sell or threatened to refuse to sell to certain distributors who have failed to, or have been suspected of failing to, sell at prices established or suggested by respondent for its products; and

(c) Negotiated directly with certain retailers the wholesale prices to be charged to such retailers by distributors for respondent's products.

Effects

19. The aforesaid acts and practices of the respondent have the tendency to or the actual effect of fixing, maintaining and stabilizing the prices at which respondent's products are sold by certain distributors to retailers.

Violation Alleged

20. The acts and practices of the respondent as set forth in Paragraph 18 above constitute unfair methods of competition and restrain trade in violation of Section 5 of the Federal Trade Commission Act.

Count IV

21. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count IV as if fully written herein.

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Nature of the Violation

22. In the course and conduct of its business in commerce Hartz Mountain has:

(a) Discriminated in price in the sale of pet supplies of like grade and quality by granting discounts, rebates and other reductions in price to some distributors while not offering or granting such reductions in price to competing distributors; and

(b) Discriminated in price, directly and indirectly, in the sale of pet supplies of like grade and quality by granting discounts, rebates and other reductions in price to some retail customers while not offering or granting such reductions in price to competing retail customers.

Effects

23. The aforesaid acts and practices of the respondent have the effect of:

(a) Substantially lessening competition or tending to create a monopoly in the manufacture, distribution and sale of pet supplies; and

(b) Injuring, destroying or preventing competition with Hartz Mountain or with distributors and retail customers who receive the benefits of such discrimination in price.

Violation Alleged

24. The acts and practices of the respondent as set forth in Paragraph 22 above constitute unlawful discrimination in price in violation of subsection 2(a) of the Clayton Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act and the Clayton Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Hartz Mountain Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 700 South Fourth St., Harrison, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

For the purposes of this order the following definitions shall apply:

A. "Pet supply" means a product that is utilized in the everyday maintenance, care and enjoyment of common household pets and includes, but is not limited to, such items as pesticidal collars, shampoos, medicinals, rawhide and rubber chewing toys, leashes, feeding dishes, books, bird and small animal cages, cat litter, aquariums, aquariums pumps, heaters, filters and ornaments, dog and cat treats and biscuits, small animal treats, pet and wild bird seed, fish foods and aquarium remedies.

B. "Manufacturer" means any person engaged in production, assembly or packaging of pet supplies or which causes production, assembly or packaging of pet supplies to be done for it. The term manufacturer shall not include any person engaged primarily as a retailer which uses its own trademark in connection with pet supplies.

C. "Distributor" means any person which sells pet supplies for its own account to retailers.

D. "Service distributor" means a distributor which provides a retailer with service ancillary to the sale of pet supplies.

E. "Service" means setting up displays and fixtures, marking individual products with prices designated by a retailer, delivering to individual retail outlets, stocking the displays or fixtures with less than case lots, setting up promotions and floor displays, cleaning and otherwise maintaining displays and fixtures, and removing damaged, shopworn and slow moving pet supplies.

F. "Retailer" means any person which sells pet supplies primarily for its own account to consumers.

G. "Consumer" means any person who uses pet supplies on a noncommercial basis.

H. "Person" means any individual, partnership, firm, association, corporation or other legal or business entity (other than a corporation in which The Hartz Mountain Corporation owns or controls 50% or more of the outstanding shares of stock representing the right to vote for the election of directors).

I. "United States" means the States of the United States of America, its territories or possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

J. "General marketing area" means the most recent available Neilsen Station Index Designated Market Area.

I

It is ordered, That The Hartz Mountain Corporation (hereinafter referred to as Hartz Mountain), its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale or sale of any pet supply in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into or enforcing any condition, agreement or understanding with any distributor or retailer that such distributor or retailer must refrain from the purchase of any pet supply of any manufacturer other than Hartz Mountain.

2. Charging or offering to charge a price to a distributor or retailer, granting or offering to grant to a distributor or retailer any discount from or rebate upon such price, or paying or offering to pay anything of value to or for the benefit of a distributor or retailer, on the condition, agreement or understanding with such distributor or retailer that such distributor or retailer must refrain from the purchase of any pet supply of any manufacturer other than Hartz Mountain.

3. Refusing to sell any pet supply to any distributor or retailer because such distributor or retailer has refused to enter into any contract, agreement or understanding that such distributor or retailer

must refrain from the purchase of any pet supply of any manufacturer other than Hartz Mountain.

4. Entering into or enforcing any contract, agreement or understanding with any distributor that such distributor must resell any Hartz Mountain pet supply only from a designated warehouse location or must refrain from expanding its facilities or adding new facilities in existing or new locations, *provided, however*, that nothing in this order shall require Hartz Mountain to ship for the account of a distributor to a location other than a warehouse of such distributor.

5. Falsely disparaging in any manner the financial status of any distributor or manufacturer of any pet supply.

It is further ordered, That Hartz Mountain shall:

6. For a period of five (5) years, commencing with the date of service of this order, offer to sell in the ordinary course of business reasonable quantities of any part or all of its pet supplies at its usual prices, terms and conditions of sale to any person engaged primarily as a retailer located in the United States or to any service distributor located in the United States who is a service distributor for Hartz Mountain pet supplies pursuant to a continuing contract, agreement or understanding on the date of service of this order (a) which requests in writing to purchase any pet supply from Hartz Mountain; (b) which is neither owned nor controlled by nor is an agent for a manufacturer of pet supplies; (c) which has not brought a pending suit nor is threatening in writing to bring suit against Hartz Mountain; and (d) which satisfies Hartz Mountain's reasonable credit, minimum quantity and delivery standards, which minimum quantity and delivery standards shall be made available on request in writing to any such retailer or service distributor, *provided, however*, that nothing in this order shall be construed to prevent Hartz Mountain from terminating any distributor or retailer in a manner that does not violate this order, and that nothing in this order shall be construed to require Hartz Mountain to offer to sell in a period of scarcity any pet supply that is not available in reasonably sufficient quantities to meet the reasonable requirements of Hartz Mountain's existing customers.

7. For a period of five (5) years, commencing with the date of service of this order, establish and maintain a file of all records referring or relating to Hartz Mountain's refusal to sell any pet supply to any prospective distributor or retailer located in the United States whose request in writing is received at the principal office of Hartz Mountain, which file shall contain a record of a written communication to each such prospective distributor or retailer explaining the reason for Hartz Mountain's refusal to sell and which file shall be made available for Federal Trade Commission inspection on reasonable

notice; and, annually, for a period of five (5) years, commencing with the date of service of this order, submit a report to the Federal Trade Commission listing the names and addresses of all such prospective distributors or retailers to whom Hartz Mountain has refused to sell during the preceding year, a description of the reason for each such refusal, and the date of each such refusal.

II

It is further ordered, That Hartz Mountain, its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale or sale of any pet supply in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into or enforcing any contract, agreement or understanding with any distributor requiring that such distributor provide service in connection with any pet supply sold by it to retailers that have not requested such service, *provided, however,* that nothing in this order shall be construed to prevent Hartz Mountain from (a) requiring any distributor to sell to any retailer or to service and display Hartz Mountain pet supplies in the manner and quantity designated by such retailer, unless otherwise advised by such retailer, (b) requiring any distributor to maintain reasonable facilities, including warehouse facilities, trucks and service personnel so that service ancillary to the sale of pet supplies can be performed if requested by a retailer, or (c) refusing to sell pet supplies to any distributor which does not sell to, service and display Hartz Mountain pet supplies in the manner and quantity so designated by a retailer, unless otherwise advised by such retailer.

2. Entering into or enforcing any contract, agreement or understanding with any distributor that such distributor must not resell or offer to resell any pet supply purchased from Hartz Mountain to one or more designated persons or outside one or more geographic areas.

3. Refusing to sell any pet supply to any distributor because such distributor will not agree that it must not resell or offer to resell any pet supply purchased from Hartz Mountain to one or more designated persons or outside one or more geographic areas.

III

It is further ordered, That Hartz Mountain, its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with offering for sale or sale of any pet supply in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

1. Requiring any distributor to sell, offer to sell or promote any pet supply at a price fixed, established, maintained or suggested by Hartz Mountain.

2. Refusing to sell any pet supply to any distributor because such distributor will not sell, offer to sell or promote any pet supply at a price fixed, established, maintained or suggested by Hartz Mountain.

3. Suggesting in writing to any distributor or retailer any price at which any distributor may or will sell, offer to sell or promote any pet supply, *provided, however,* that if subsequent to three (3) years after the date of service of this order Hartz Mountain makes any such price suggestion, each such suggestion must include a clear and conspicuous statement that such price is suggested only.

4. For a period of three (3) years, commencing with the date of service of this order, suggesting orally to any retailer the price at which any distributor may sell or resell, offer to sell or promote any pet supply unless any such suggestion directed to a retailer is accompanied by a clear statement that such price is suggested only for informational purposes and that the distributor is free to sell at whatever price it may choose, and is accompanied by a list of all of Hartz Mountain's service distributors with warehouse facilities in the general marketing area of the retailer.

5. For a period of three (3) years, commencing with the date of service of this order, suggesting orally to any distributor who buys directly from Hartz Mountain the price at which such distributor may sell or resell, offer to sell or promote any pet supply to a retailer, *provided, however,* that any price suggestion made to a retailer in conformance with the preceding paragraph may be orally reported to a distributor if all distributors whose names appear on the submitted list are so informed, and *provided, further* that any oral price suggestion is accompanied by a clear statement that prices are provided only for informational purposes and that the distributor is free to resell at whatever price it may choose.

IV

It is further ordered, That Hartz Mountain, its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the sale of any pet supply in commerce, as "commerce" is defined in the Clayton Act, as amended, shall forthwith cease and desist from:

For a period of ten (10) years, commencing with the date of service of this order, discriminating, directly or indirectly, in the price of Hartz Mountain's pet supplies of like grade and quality by selling any such pet supply to any purchaser (who is not a manufacturer) at a net price lower than the net price charged to any other purchaser competing with the former purchaser in the resale of any such pet supply, unless Hartz Mountain has, in fact, made such lower net price functionally available to all such competing purchasers.

It is further ordered, That nothing in this order shall be construed to prevent any of the following which Hartz Mountain may raise as defenses to be proved by it in any enforcement action brought to enforce Part IV of this order: price discrimination which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such pet supplies are sold or delivered to such purchasers, or which is made in good faith to meet an equally low price of a competitor, or where the purchaser is an agency of the United States of America; nor shall anything in this order be construed to prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the pet supply concerned, such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process or sales in good faith in discontinuance of business in the pet supply concerned; and *provided further* that nothing in this order shall be construed to prevent Hartz Mountain from asserting any other defenses available to it under the law to a charge of price discrimination; and *provided further* that for a period of ten (10) years, commencing with the date of service of this order, Hartz Mountain shall maintain a separate file at its principal office containing accurate documentation of: (a) each published price of Hartz Mountain for the sale by it of a pet supply, showing the period during which such published price was in effect; and (b) each variation in price in which Hartz Mountain sells any pet supply at a net price other than that prescribed in the applicable published price, showing the net price charged to such purchaser and the justification for such variation from the published price. Such file shall be made available for Federal Trade Commission inspection on reasonable notice.

V

It is further ordered, That:

1. This order shall not apply to activities outside the United States which do not directly affect the foreign or domestic commerce of the United States.

2. Nothing in this order shall be construed to prevent Hartz Mountain itself from selling pet supplies as a service distributor or otherwise to any retailer.

VI

It is further ordered, That Hartz Mountain shall:

1. Provide a copy of this order to its officers, directors, sales representatives and all distributors and retailers located in the United States who buy Hartz Mountain brand or Delta brand pet supplies directly from Hartz Mountain. Within sixty (60) days of the date of service of this order, Hartz Mountain shall cause to be published in *Supermarket News* the provisions of this order or shall provide a copy of this order to current subscribers of *Supermarket News*. For a period of five (5) years, commencing with the date of service of this order, all new distributors and retailers located in the United States who buy pet suppliers directly from Hartz Mountain are to be furnished a copy of this order.

2. Notify the Commission at least thirty (30) days prior to any proposed change in Hartz Mountain which may affect complaince obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other such change.

3. File with the Federal Trade Commission, within sixty (60) days of the date of service of this order, a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

NOLAN'S R.V. CENTER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE MAGNUSON-MOSS WARRANTY ACT

Docket C-3009. Complaint, Feb. 5, 1980—Decision, Feb. 5, 1980

This consent order requires, among other things, a Denver, Colo. retailer of motor homes, campers, and travel trailers to cease failing to place inside each vehicle it offers for sale, all applicable written warranties; and a sign giving the location of such warranties, and stressing the importance of comparing warranty terms before making a purchase. The firm is required to instruct its employees as to their specific obligations and duties under federal law, and to institute a surveillance program designed to detect violators of the order.

Appearances

For the Commission: *F. Kelly Smith, Jr.* and *Brenda V. Johnson.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act") and the implementing Rule Concerning the Pre-Sale Availability of Written Warranty Terms (16 CFR 702 (1979)) (effective January 1, 1977) ("Pre-Sale Rule") duly promulgated on December 31, 1975 pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309 (1976)) (a copy of the Pre-Sale Rule is marked and attached as Appendix A* and is incorporated herein by reference as if fully set forth verbatim), and by virtue of the Authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Nolan's R.V. Center, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Pre-Sale Rule, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Nolan's R.V. Center, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado. Its principal office and place of business is located at 6935 Federal Boulevard, Denver, Colorado.

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* Not reproduced herein for reasons of economy.

PAR. 2. Respondent has been, and is now engaged in the advertising, offering for sale, and sale of motor homes, campers, recreational vehicles, and travel trailers to the public.

PAR. 3. In the course and conduct of its business, respondent offers for sale and sells to consumers, consumer products distributed in commerce as "consumer product", "consumer" and "commerce" are defined by Sections 101(1), 101(3), 101(13) and 101(14), respectively, of the Warranty Act.

PAR. 4. Subsequent to January 1, 1977, respondent, in the course and conduct of its business, has offered for sale and sold motor homes, campers, recreational vehicles, travel trailers and other consumer products costing the consumer in excess of $15.00, many of which are warranted by the manufacturers. Respondent is therefore, a seller as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

PAR. 5. In connection with the offering for sale and sale of motor homes, campers, recreational vehicles, travel trailers, and other consumer products, respondent has failed, as required by Section 702.3(a) of the Pre-Sale Rule, to make the text of the written warranties available for prospective buyers' review prior to sale through one or more of the following methods:

(a) Clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product;

(b) Maintaining a warranty binder system which is readily available to the prospective buyers, along with conspicuous signs indicating the availability and identifying the location of binders when the binders are not prominently displayed;

(c) Displaying the package of the consumer product on which the text of the written warranty is disclosed in such a way that the warranty is clearly visible to prospective buyers at the point of sale; and

(d) Placing a sign which contains the text of the written warranty in close proximity to the product to which it applies.

PAR. 6. Respondent's failure to comply with the Pre-Sale Rule as described in Paragraph Five of this Complaint is a violation of the Warranty Act, and is therefore an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, and the Rule Concerning the Pre-Sale Availability of Written Warranty Terms promulgated under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nolan's R.V. Center, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 6935 Federal Boulevard, Denver, Colorado.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I. Definitions

For the purposes of this order the definitions of the terms "consumer product," "warrantor," and "written warranty" as defined in Section 101 of the Warranty Act (15 U.S.C. 2301 (1976)) shall apply. The definition of the term "binder" as defined in § 702.1(g) of the Pre-Sale Rule (16 CFR 702 (1979)) shall apply.

II.

It is ordered, That respondent Nolan's R.V. Center, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, and sale of motor homes, campers, recreational vehicles, travel trailers or other consumer products, do forthwith cease and desist from:

1. Failing to make available in respondent's display area for prospective buyers' review prior to sale, the text of any written warranties offered or granted by the manufacturers of motor homes, campers, recreational vehicles, travel trailers and other consumer products sold by respondent.

With respect to motor homes, campers, recreational vehicles, and travel trailers "display area" means a prominent location inside each motor home, camper, recreational vehicle, and travel trailer.

2. Maintaining a binder or series of binders to satisfy the requirements of Paragraph 1, above, unless such binder or binders are located in each motor home, camper, recreational vehicle, and travel trailer being displayed for sale by respondent, and such binder or binders include at least one copy of each written warranty applicable to the motor home, camper, recreational vehicle, travel trailer and the consumer products contained in such motor home, camper, recreational vehicle, or travel trailer.

In utilizing any such binder or binders respondent shall:

(a) provide prospective buyers with ready access thereto; and

(b) (1) display such binder(s) in a manner reasonably calculated to elicit the prospective buyers' attention; or

(2) (i) make such binder(s) available to prospective buyers' on request; and

(ii) place signs reasonably calculated to elicit the prospective buyers' attention in prominent locations within each motor home, camper, recreational vehicle or travel trailer, advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access; and

(c) index such binder(s) according to product or warrantor; and

(d) clearly entitle such binder(s) as "Warranties" or other similar title.

III.

It is further ordered, That respondent shall post, in a prominent location in each motor home, camper, recreational vehicle and travel trailer being displayed for sale, a sign, eleven inches (length) by seventeen inches (width), reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

IMPORTANT!

NOT ALL WARRANTIES ARE THE SAME

We provide warranties for you to compare before you buy

Please ask to see them

Check: Full or limited?
What costs are covered?
What do you have to do?

Are all parts covered?
How long does the warranty last?

Such sign shall be posted for a period of not less than three years from the effective date of this order. The language in such sign shall be unencumbered by other written or visual matter, shall be indented and punctuated as indicated in the paragraph above, and shall be printed in black against a solid white background, as follows:

a. The word "Important" shall serve as the title of the notice and shall be printed in capital letters in 60 point boldface type followed by an exclamation point.

b. The next phrase shall be printed on a separate line in capital letters and in 42 point boldface type.

c. The next two phrases shall be printed on separate lines and in 36 point medium face type.

d. Each succeeding phrase shall be printed on a separate line and in 24 point medium face type.

IV.

1. *It is further ordered*, That respondent shall deliver a copy of this order to cease and desist to all present and future employees, salespersons, agents, independent contractors, and other representatives of respondent engaged in the sale of motor homes, campers, recreational vehicles, travel trailers, or other consumer products on behalf of respondent, and secure a signed statement acknowledging receipt of the order from each such person.

2. *It is further ordered*, That respondent shall instruct all present and future employees, salespersons, agents, independent contractors, and other representatives of respondent, engaged in the sale of motor

homes, campers, recreational vehicles, travel trailers or other consumer products on behalf of respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Pub. Law 93-637, 15 U.S.C. 2301, *et seq.*), all present and future implementing Rules promulgated under the Act, and this order.

3. *It is further ordered,* That respondent shall institute a program of continuing surveillance to reveal whether respondent's employees, salespersons, agents, independent contractors, or other representatives are engaged in practices which violate this order.

4. *It is further ordered,* That respondent shall maintain complete records for a period of not less than three (3) years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any of respondent's employees, salespersons, agents, independent contractors, or other representatives. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the individual involved, the date of the communication and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission during normal business hours upon reasonable advance notice.

5. *It is further ordered,* That respondent shall maintain, for a period of not less than three (3) years from the effective date of this order, complete business records to be furnished upon request to the staff of the Federal Trade Commission, relating to the manner and form of its continuing compliance with all the terms and provisions of this order.

6. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in obligations arising out of this order.

7. *It is further ordered,* That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

TEXAS ASSOCIATION OF PROFESSIONAL SURETIES, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C—3010. Complaint, Feb. 13, 1980—Decision, Feb. 13, 1980

This consent order requires, among other things, an Odessa, Tex. unincorporated trade association of bail bondsmen and its Houston, Tex. affiliate to cease establishing, fixing or maintaining uniform non-competitive prices for the sale of bail bonds; requiring adherence to such prices through coercion or otherwise; and attempting by any means to eliminate competition between or among bail bondsmen. The associations are prohibited from discussing prices and recalcitrant members at meetings; and required to timely amend any rule, by-law or code of ethics so as to conform with the terms of the order. Additionally, respondents are required to terminate the membership of any member who fails to comply with those terms.

Appearances

For the Commission: *Steven E. Weart* and *Joel Winston.*

For the respondents: *Joseph J. Rey*, Jr. El Paso, Tex., and *Michael Ramsey*, Houston, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Texas Association of Professional Sureties and Association of Professional Sureties of Houston, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Texas Association of Professional Sureties (TAPS) is a non-profit, unincorporated trade association whose members are engaged in business for profit. It was organized in 1965 and currently maintains its offices at 318 North Texas St., Odessa, Texas. Respondent TAPS is composed of approximately fifty bail bondsmen located within the State of Texas, comprising approximately one-sixth of all persons engaged in the business of writing bail bonds in the State of Texas. Its affairs are managed by its officers, who are elected by the membership. These officers include president, vice president, and secretary-treasurer.

PAR. 2. Respondent Association of Professional Sureties of Houston (HAPS) is a non-profit, unincorporated trade association whose members are engaged in business for profit. It maintains its offices at 212 Scanlan Building, 405 Main St., Houston, Texas. Respondent HAPS is composed of approximately 30 bail bondsmen located within Harris County, Texas, comprising approximately 90% of all persons engaged in the business of writing bail bonds in Harris County. Its affairs are managed by its officers, who are elected by the membership. These officers include president, treasurer, and secretary.

PAR. 3. Respondents are organized and function to promote and advance the pecuniary and other interests of their members and the bail bond profession. Their activities include lobbying for legislation favorable to their members, maintaining and supervising member conduct in accordance with their codes of ethics, and serving as conduits for the exchange of information among members.

PAR. 4. Local (county or city-wide) associations of bail bondsmen, including HAPS, are directly affiliated with TAPS. TAPS members pay monthly dues to the local affiliates of which they are members. These dues are then forwarded by the local affiliates to TAPS. Under the TAPS Constitution, local affiliate presidents have numerous functions in the policymaking and day-to-day activities of TAPS. For example, changes in TAPS dues must be approved by the president of TAPS and at least three local affiliate presidents.

TAPS was originally formed by HAPS and its members for the purpose of coordinating the activities of bail bondsmen throughout the State of Texas. The majority of the current membership of TAPS is made up of HAPS members, and two of the three officers of TAPS are also HAPS members. The TAPS Code of Ethics, as described in Paragraph Seven below, was adopted in whole from the HAPS Code of Ethics.

PAR. 5. Most of the members of the respondents write a significant protion of their bail bonds for criminal defendants arrested in Texas, but residing in states other than Texas. Additionally, most of the members write or arrange for the writing of bail bonds for Texas residents arrested in states other than the State of Texas. A large percentage of the members are agents for national surety companies, which underwrite their bail bonds. These surety companies maintain offices in states other than the State of Texas. In the course of their business, the surety companies transmit powers of attorney, contracts, and other correspondence and communications to agents, and receive fees, statistical information and other transmissions from agents within the State of Texas, through the mails and other instrumentalities of interstate commerce.

As a result of the aforesaid transactions, and by virtue of respondents' representation of their members and promotion of their business, respondents and their memberships have been and are now engaged in a pattern, course of dealing, and substantial volume of trade in bail bonds in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Par. 6. The bail bondsmen holding membership in the respondent associations are in substantial competition with one another and with other members of the industry in the sale of bail bonds, in or affecting commerce, except insofar as that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

Par. 7. For many years past, and continuing in the present time, respondents have planned, adopted, put in effect, and carried out policies having the purpose, tendency and effect of hindering, frustrating, restraining, suppressing and eliminating competition in the offering for sale and sale of bail bonds in or affecting commerce. Pursuant to, and in furtherance of, the above policies respondents, alone and by means of agreements, understandings, and combinations and conspiracies with certain of its members and with others, have engaged and continue to engage in the following acts and practices:

(a) Determining, fixing, establishing, stabilizing, effectuating and maintaining uniform, identical, non-competitive prices for the sale of bail bonds.

(b) Promoting, encouraging, and coercing adherence to, and discouraging and deterring variance from, said uniform, identical, non-competitive prices among member and non-member bail bondsmen.

(c) Holding regular meetings at which members discuss with other members the prices for which bail bonds have been and are to be sold by member and non-member bail bondsmen, the identity of member and non-member bail bondsmen charging prices lower than those approved by respondents and their members, and actions to be considered or taken against such bail bondsmen identified, all for the purpose and having the effect of determining, fixing, establishing, stabilizing, effectuating and maintaining uniform, identical, non-competitive prices for the sale of bail bonds.

(d) Promulgating and maintaining Codes of Ethics, with which members are required to comply, which state the following:

> (i)n instances where the risk is average, the standard fee charged for bonds will be 10% for local State, 15% out of County State, and 15% Federal. This scale on fees will not be binding where, in the opinion of the Surety the risk on a bond is greater than average.

PAR. 8. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, as hereinabove alleged, are unfair and to the prejudice of the public because they have the purpose, tendency, and effect of hindering, lessening and restraining competition in the sale of bail bonds between and among bail bondsmen; raising barriers to entry of new competition in the sale of bail bonds; and limiting and restricting channels of distribution of bail bonds.

Said acts, practices and methods of competition constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Texas Association of Professional Sureties is an unincorporated, non-profit trade association with its principal office and place of business located at 318 North Texas St., Odessa, Texas.

2. Respondent Association of Professional Sureties of Houston is an

unincorporated, non-profit trade association with its principal office and place of business located at 212 Scanlan Building, 405 Main St., Houston, Texas.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Texas Association of Professional Sureties and respondent Association of Professional Sureties of Houston, individually, and their respective officers, directors, agents, representatives, employees, successors and assigns, directly or indirectly or through any corporation, subsidiary, affiliate, association, division, committee or other device, in connection with each respondent association's business, or with the offering for sale, sale, distribution or promotion of bail bonds, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, cooperating in, or carrying out any agreement, understanding or combination, express or implied, or unilaterally to do, adopt or perform any of the following acts, policies or practices:

1. Determining, fixing, suggesting, recommending, establishing, stabilizing, maintaining or effectuating, or attempting to determine, suggest, recommend, fix, establish, stabilize, maintain, or effectuate any price, term or condition of sale, price floor, or minimum charge to customers for bail bonds.

2. Promoting, encouraging, requiring or coercing adherence to, or discouraging or deterring variance from, any price, term or condition of sale, price floor or minimum charge to customers for bail bonds.

3. Discussing at any meeting or elsewhere:

(a) any price, term or condition of sale, price floor, or minimum charge to customers for bail bonds;

(b) the prices charged by, or terms or conditions of sale of, any member or non-member bail bondsman or bondsmen; or

(c) any action to be considered or taken in regard to any bail bondsman or bondsmen by reason of the price which such person or persons charge or their terms or conditions of sale.

4. Promulgating, adopting, maintaining, enforcing or requiring adherence to any constitution, code of ethics, rule, regulation, by-law, or other device by which any price, term or condition of sale, price floor, or minimum charge to customers for bail bonds is determined,

fixed, suggested, recommended, established, maintained, or effectuated.

5. Restricting or preventing, or attempting to restrict or prevent, any bail bondsman from carrying on any lawful course of action, or from engaging in trade or commerce by lawful methods of his or her own choosing.

6. Eliminating or attempting to eliminate competition between or among bail bondsmen.

It is further ordered, That each respondent shall, within thirty (30) days after service upon it of this order, mail by first class mail a copy of this order to each of its members, with a notice that such member must abide by the terms of this order as a condition to continued membership in the association.

It is further ordered, That, immediately upon completion of the above mailings, each respondent obtain from the person(s) actually performing the required mailing of each order and notice, an affidavit verifying the mailing of each such document, and specifying the particular person or business entity and address to which such document was mailed.

It is further ordered, That each respondent shall, within thirty (30) days after service upon it of this order, amend its charters, constitutions, by-laws, codes of ethics, rules and regulations by eliminating therefrom any provision which is contrary to or inconsistent with any provision of this order; and that each respondent shall thereafter require as a condition of membership that all of its present and future members act in accordance with the provisions of this order, and shall terminate the membership of any member not acting in accordance with the provisions of this order.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in such respondent such as dissolution, incorporation, assignment or sale resulting in the emergence of a successor entity, the creation or dissolution of any subsidiary or affiliate or any other change in such association which may affect compliance obligations arising out of the order.

It is further ordered, That each respondent, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it complied with this order including copies of all affidavits required by this order to be obtained by each respondent.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, Feb. 15, 1980

ORDER DIRECTING GENERAL COUNSEL TO CONTINUE COURT ENFORCEMENT OF SUBPOENA DUCES TECUM

On November 16, 1979, the administrative law judge certified his recommendation to the Commission that the General Counsel be directed to continue proceedings for enforcement of a subpoena *duces tecum* issued to Hills Bros. Coffee, Inc. By motion dated December 3, 1979, Hills Bros. urged the Commission to withdraw its enforcement efforts. On December 20, 1979, respondent General Foods, filed a pleading in support of the ALJ's recommendation.

Our original order for court enforcement was issued on July 12, 1979, and directed the General Counsel to seek enforcement of those portions of the subpoena that concern marketing plans for Hills Bros.' "High Yield" coffee. After enforcement proceedings were initiated in district court, we learned, through the General Counsel, that complaint counsel had informed the administrative law judge that proof of economic injury to Hills Bros. was not an essential element of their case. However, the ALJ had previously denied Hills Bros.' motion to quash partly because he deemed the documents on "High Yield" coffee relevant to the question of economic injury. We therefore issued an order on November 9, 1979, directing the ALJ to reconsider his ruling in light of complaint counsel's assertions. .Our order also directed the General Counsel to seek a stay of enforcement proceedings in district court pending the ALJ's reconsideration.

The ALJ's present recommendation for enforcement recognizes complaint counsel's statement that economic injury to Hills Bros. is not essential to their case. However, his certification is based on the fact that complaint counsel have nevertheless expressed their desire to elicit testimony on this subject. The ALJ believes that information concerning Hills Bros.' ability to introduce "High Yield" to the market after the period of General Foods' allegedly anticompetitive activities is relevant to the economic injury issue. He has limited his recommendation for enforcement, however, to marketing plans that concern only the first year in which "High Yield" coffee was introduced. This modification was suggested to conform to a similar limitation adopted by the ALJ in responding to a motion by Folger Coffee Company to quash a similar subpoena *duces tecum*.

The Commission has consistently held that an administrative law judge has wide discretion in discovery matters and that his determinations should not be reversed absent a clear abuse of discretion. E.g., *Warner-Lambert Co.*, 83 F.T.C. 485 (1973). We find no such abuse of discretion here because the documents sought from Hills Bros. may well have substantial relevance to the testimony adduced by complaint counsel on economic injury. (*See* Commission Rule 3.31(b)(1).) We therefore agree with the law judge's recommendation that court enforcement of the subpoena be sought to the extent its specifications cover marketing plans for the first year "High Yield" was sold.

Hills Bros. has objected to the fact that the protective order issued by the ALJ on August 28, 1978, permits General Foods' in-house counsel as well as its outside counsel free access to the requested marketing plans. In our order of July 12, 1979, we observed that "the safeguards imposed by the ALJ to protect sensitive commercial data seem reasonably designed to prevent unwarranted disclosure of such information to respondent's employees." We have reconsidered these comments, however, in light of the competitive injury that Hills Bros. might suffer if its marketing plans should be disclosed to General Foods. Given the obvious competitive sensitivity of Hills Bros.' marketing plans and the fact that General Foods is represented by outside counsel, it is not clear why access to these materials should be extended to General Foods' three inside counsel of record, one or more of whom may well have advisory responsibilities to their employer that conflict with maintaining the confidentiality of Hills Bros.' marketing plans. Accordingly,

It is ordered, That the General Counsel continue to seek court enforcement of the subpoena *duces tecum* issued to Hills Bros. in so far as it seeks marketing plans for the first year "High Yield" coffee was sold, and

It is further ordered, That paragraph (4)(a) on page 7 of the ALJ's order of August 28, 1978 be modified to delete references to General Foods' named inside counsel. In the event that General Foods concludes that access to the Hills Bros. documents by one of its inside attorneys is essential to ensure fair representation, the ALJ is free to entertain an application by General Foods for a modification of the protective order subject to Hills Bros.' right to oppose any such application, in accordance with paragraph (6) on page 8 of the August 28, 1978 order.

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Interlocutory Order, Feb. 19, 1980

ORDER DENYING MOTION FOR A HEARING TO INTRODUCE EVIDENCE, COMMENT AND ARGUMENT CONCERNING *EX PARTE* COMMUNICATIONS

By motion dated January 23, 1980, respondent AMREP Corporation requests an opportunity for comment and an evidentiary hearing on *ex parte* communications between the investigative and prosecutorial staff and the Commission in this proceeding. The respondents' motion also requests leave to introduce evidence as to whether all *ex parte* communications concerning matters litigated in this case have been disclosed to the respondent. Finally, AMREP seeks to place into evidence communications that are not part of the record.

The respondent argues that its motion for comment and a hearing on *ex parte* matters finds support both in *AMREP* v. *Pertschuk*, No. 79-0491 (D.D.C., filed April 6, 1979), *appeal docketed*, No. 79-1592 (D.C.Cir. 1979) and in the Commission's order of July 12, 1979. We agree that the court's opinion and our order affirmed the respondents' right to comment on *ex parte* communications. Nevertheless, it was apparent in both instances that such comments were to be made in the course of the Commission's normal appellate procedure. The respondent should thus have been well aware that its opportunity to address *ex parte* matters was in its appeal brief and, to the extent full discussion would have required, in its answer and reply briefs. *See* Rule 3.52. Furthermore, while the court's opinion and our order noted that the Commission was empowered to take evidence on appeal, they did not indicate the respondent had any right to an evidentiary hearing. Rule 3.54 makes it clear, in fact, that such hearings are to be held only if the Commission deems them necessary.

Here, AMREP has evidently decided to forego its right to address *ex parte* matters in the context of normal appellate procedures. It has instead raised the issue in a motion filed eleven days after its answer brief. The motion does not explain what the nature of its comments on *ex parte* communications might be, why it feels any evidentiary hearing is required, or even why it waited until the eleventh hour to seek such relief. At this late stage in the proceedings, the Commission is not prepared to grant the respondents' requests on such an insubstantial showing.

We are similarly unprepared to grant AMREP's request to introduce evidence as to whether it has been fully informed of all *ex parte* communications concerning matters in litigation before the agency.

The respondent has already received assurances from counsel representing the Commission in *AMREP* v. *Pertschuk* that all such communications have been disclosed. Indeed, in his opinion disposing of the case, Judge Gasch concluded that "all existing *ex parte* communications even remotely related to [AMREP] have been disclosed and placed on the public record."

The final aspect of AMREP's motion is its request to place into evidence all *ex parte* communications not previously made part of the record. The communications involved in this request are few in number and unrelated to the facts at issue in the matter before us on appeal.[1] Therefore, nothing in the Commission's rules would require us to place the communications on the record. AMREP has, moreover, offered us no indication as to the purpose or the significance of its request. However, while we do not believe that the communications should be introduced into evidence, we have no objection to the communications being placed on the record.[2] Accordingly,

It is ordered, That all *ex parte* communications not previously placed on the record be placed on the record, and

It is further ordered, That in all other respects the respondents' motion be, and hereby is, denied.

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[1] Illustrative of the communications involved are a Commission minute of May 17, 1978 authorizing the Bureau of Consumer Protection to submit comments to Federal District Court Judge Lasker on civil cases involving AMREP, and a March 13, 1979 affidavit by John F. Dugan to the effect that specific land sales cases were not discussed at a Commission budget meeting.

[2] Rule 4.7(c) requires *ex parte* communications to be placed in the docket binder of the proceeding, but prohibits the Commission from considering them for purposes of its decision. Because all other *ex parte* communications are in this category, we deem it appropriate for those documents to be located in the same place.

IN THE MATTER OF

AMF INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3011. Complaint, Feb. 21, 1980—Decision, Feb. 21, 1980

This consent order requires, among other things, a White Plains, N.Y. manufacturer and seller of bicycles, tricycles and other two- or three-wheeled non-motorized vehicles to cease, in connection with the advertising and sale of its products, from representing young children or others riding or operating such vehicles in an improper, unsafe or unlawful manner. The firm is also prohibited from representing any person riding a minibike in traffic unless such operation is permitted by applicable traffic laws and regulations. The order further requires the firm to timely produce two or more versions of a bicycle safety message with the advice, assistance and approval of three independent individuals experienced or knowledgeable in bicycle safety, children's advertising and children's television programming; provide a film of such message to specified television broadcasting stations throughout the country; and monitor the message for four months to ensure that it reaches a designated number of children. Should the message fail to reach the specified audience level, respondent is required to distribute the film for airing by a second group of T.V. stations.

Appearances

For the Commission: *Louise R. Jung* and *John G. Siracusa.*

For the respondent: *Hugh Latimer, Bergson, Borkland, Margolis & Adler,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that AMF Incorporated, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent AMF Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 777 Westchester Ave., White Plains, New York.

Respondent's Wheel Goods Division is principally responsible for the manufacture and sale of respondent's bicycles, tricycles and other wheeled toys.

PAR. 2. Respondent is now and for all times relevant to this complaint has been engaged in the production, distribution, and sale of a variety of bicycles, tricycles and other wheeled toys.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising material, including, but, not limited to, the advertising referred to herein, to promote the sale of bicycles and tricycles, including, but not limited to, the "Evel Knievel MX," the "Evil Knievel Hot Seat" and the "Avenger."

PAR. 4. In the course and conduct of its aforesaid business, respondent causes and has caused wheeled goods to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce.

PAR. 5. In the course and conduct of its aforesaid business, respondent has disseminated, and caused the dissemination of certain television advertisements concerning said products in or affecting commerce which were broadcast by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce.

PAR. 6. Typical and illustrative of the statements and representations in respondent's advertisements disseminated by means of television, but not all inclusive thereof, are the "Can't Wait" and "Avenger" advertisements. In "Can't Wait," two young boys are shown riding their respective vehicles, a bicycle and tricycle, down their parallel driveways, continuing a short distance into the adjoining street so as to greet each other, without slowing down or looking out for cars or other possible dangers to themselves or others. In "Avenger," one young boy is shown riding a bicycle on a one-way street, then turning onto a sidewalk and into a vacant dirt lot without slowing down or looking right or left, riding over rough and uneven ground in the dirt lot, and then turning into an alley without slowing down or looking right or left.

PAR. 7. A. The aforesaid advertisements have the tendency or capacity to influence young children to ride or operate a bicycle, tricycle or other similar wheeled toy in a street, road, alley or other traffic thoroughfare.

B. Furthermore, the aforesaid advertisements have the tendency or capacity to influence children to engage in the following behavior with respect to the use of bicycles, tricycles, or other similar wheeled toys:

1. Riding across rough and uneven ground on a bicycle, tricycle or other similar wheeled toy in a manner which creates an unreasonable risk of harm to person or property.

2. Riding or operating a bicycle, tricycle or other wheeled toy in a manner which is contrary to generally recognized standards of safety for the operation or use of a bicycle, tricycle or other similar wheeled toy.

Therefore, such advertisements have the tendency or capacity to induce behavior which involves an unreasonable risk of harm to person or property, and were and are therefore unfair or deceptive acts or practices.

PAR. 8. In the course and conduct of its aforesaid businesses, and at all times mentioned herein, respondent has been and is now, in substantial competition, in or affecting commerce, with other corporations engaged in the manufacture and sale of bicycles, tricycles and other wheeled toys.

PAR. 9. The aforesaid acts or practices of respondent, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the named respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the named respondent with violation of the Federal Trade Commission Act; and

The named respondent, AMF Incorporated, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the named respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the named respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the named respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement on the public record for a period of sixty (60) days and the named respondent having thereafter submitted modifications to the executed agreement, dated September 26, 1979; and

The Commission, having duly considered the comments filed by interested persons pursuant to Section 2.34 of its Rules during the sixty (60) day period and the recommendations of its staff, now in further conformity with the procedures prescribed in Section 2.34 of its Rules, hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. The named respondent, AMF Incorporated, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with an office and place of business located at 777 Westchester Ave., White Plains, New York.

2. Respondent's Wheel Goods Division is principally responsible for the manufacture and sale of respondent's bicycles, tricycles and other wheeled toys.

ORDER

For the purpose of this Order, the term "non-motorized two- or three-wheeled vehicle" shall include bicycles, tricycles, and other similar non-motorized two- or three-wheeled vehicles. The term "minibike" shall refer to motorized two-wheeled vehicles without gears and shall not include mopeds.

I.

It is ordered, That respondent AMF Incorporated, a corporation, hereinafter referred to as respondent, its successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or distribution in or affecting commerce of any non-motorized two- or three-wheeled vehicle or minibike, cease and desist from, directly or by implication:

A. Representing, in any manner, any child who appears to be eight years old or younger operating any non-motorized two- or three-wheeled vehicle in any public street, road, alley or other traffic thoroughfare; *provided, however*, that this provision shall not apply to the depiction of any child who appears to be five to eight years old operating a non-motorized two- or three-wheeled vehicle in any public street, road, alley, or other traffic thoroughfare when such child is accompanied and closely supervised by a person who appears to be eighteen years old or older and who is operating a non-motorized two- or three-wheeled vehicle.

B. Representing, in any manner, any person(s) performing stunts, jumps, wheelies, or any other similar act while operating a non-motorized two- or three-wheeled vehicle when such act(s) create(s) an unreasonable risk of harm to person or property; *provided, however,* that this provision shall not apply to the depiction of persons using motorcross bikes in an adult-supervised off-the-road setting and in which the participants are shown wearing helmets and where arms, legs, and feet are suitably covered.

C. Representing, in any manner, any person(s) operating or riding a non-motorized two-or three-wheeled vehicle in any public street, road, alley or other traffic thoroughfare:

1. without obeying all applicable official traffic control devices;

2. other than upon, astride or straddling a regular seat attached thereto;

3. with more persons on it, at any one time, than the vehicle is designed or safely equipped to carry, except that an adult rider may carry a child securely attached to its person in a back pack or sling;

4. while carrying any package, bundle, or article which obstructs vision or interferes with the proper control of the vehicle;

5. when such person attaches himself/herself or the vehicle to any other vehicle; *provided, however,* that this provision shall not apply to the depiction of a bicycle trailer or bicycle semitrailer attached to a bicycle if that trailer or semitrailer has been designed for such attachment and when the operation of such a bicycle with such an attachment does not create an unreasonable risk of harm to person or property;

6. unless such vehicle is equipped with reflectors in conformance with Section 1512.16 of the "Revised Safety Standards for Bicycles" (16 CFR 1512 (1978)) or any successor provision, rule or regulation issued by the Consumer Product Safety Commission and, in addition, a functioning headlamp whenever such person is operating or riding a non-motorized two- or three-wheeled vehicle at dawn, dusk or night;

7. while wearing loose clothing or long coats that can catch in pedals, chains or wheels;

8. against the flow of traffic;

9. unless such person exercises proper caution, such as by riding at

a reasonable speed and at a reasonable distance from parked cars and the edge of the road, with respect to:

a. car doors opening and cars pulling out into traffic; and

b. drain grates, soft shoulders and other road surface hazards;

10. in other than single file when travelling with other such vehicles; *provided, however*, that this provision shall not apply to the depiction of persons riding in other than single file when such behavior does not impede the normal and reasonable movement of traffic and does not create an unreasonable risk of harm to person or property;

11. unless such person exercises proper caution before entering or crossing any public street, road, alley or other traffic thoroughfare from any non-traffic area by first stopping and looking left and right and yielding the right-of-way to all vehicles approaching on such public thoroughfare to the extent necessary to safely enter the flow of traffic;

12. unless such person exercises proper caution before entering or crossing any sidewalk or other pedestrian pathway by first looking left and right and yielding the right-of-way to all pedestrians approaching on such pedestrian pathway.

D. Representing, in any manner, any person operating a mini-bike in any public street, road, alley or other traffic thoroughfare, unless such operation is lawful under applicable vehicle codes.

II.

It is further ordered, That respondent shall produce two or more versions of bicycle safety messages of from one/half to five minutes duration. In the development and production of the safety message(s), respondent agrees to secure the advice, assistance, and approval of each of three independent individuals who will provide experience or knowledge in the areas of (1) bicycle safety, (2) children's television programming, and (3) children's advertising. The conclusion reached by these individuals concerning the appropriateness of the safety messages shall be reported to the Federal Trade Commission.

It is further ordered, That, on or before September 1, 1979, respondent shall provide a film of either bicycle safety message to each television broadcasting station listed in Appendix A. Respondent shall monitor the dissemination of the safety message(s) and shall provide to the Commission a report on the gross impressions achieved by the dissemination of the safety message(s) between September 1, 1979 and December 31, 1979. This report shall be submitted on or before January 31, 1980.

It is further ordered, That, in the event the total gross impressions for the safety message(s) does not equal or exceed ten percent of the gross impressions achieved by the "Avenger" and "Can't Wait" television advertisements (as reported in Appendix B) respondent shall provide a film of the safety message(s) to each television broadcasting station listed on Appendix C on or before March 1, 1980, and shall continue to monitor the dissemination of the safety message(s) and provide to the Commission on or before July 31, 1980, a second report on the gross impressions achieved by the dissemination of the safety message(s) between March 1, 1980 and June 30, 1980.

It is further ordered, That, in the event that service of this order upon respondent occurs after June 15, 1979, the dates set forth in Section II shall be adjusted so that a period of seventy-five (75) days lapses between the date of service of this order upon respondent and the date by which respondent is required to provide a film of the bicycle safety message(s) to the stations named in Appendix A. All of the dates following this initial date shall also be adjusted to retain and allow for the same periods of time for performance of obligations outlined in this section.

For purposes of this section, the measurement of gross impressions shall include only the 6–11 year old component of the viewing audience. Gross impressions shall be measured by counting each probable exposure of a 6–11 year old child to the safety message(s), with duplication allowed.

III.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions which engage or shall engage in the preparation or dissemination of advertising.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

STATION	CITY AND STATE
WBMG	BIRMINGHAM, AL
WSFA	MONTGOMERY, AL
KPHO	PHOENIX, AZ
KERO	BAKERSFIELD, CA
KJTV	BAKERSFIELD, CA
KNBC	LOS ANGELES, CA
KABC	LOS ANGELES, CA
KCOP	LOS ANGELES, CA
KHJ	LOS ANGELES, CA
KTLA	LOS ANGELES, CA
KTTV	LOS ANGELES, CA
KLCS	LOS ANGELES, CA
KTVU	SAN FRANCISCO, CA
KGO	SAN FRANCISCO, CA
KPIX	SAN FRANCISCO, CA
KLXA	SANTA ANA, CA
KBTV	DENVER, CO
KGMH	DENVER, CO
KWGN	DENVER, CO
WRC	WASHINGTON, D.C.
WJKS	JACKSONVILLE, FL
WRN/WTHF	MIAMI, FL
WPLG	MIAMI, FL
WTVJ	MIAMI, FL
WFLA	TAMPA, FL
WSB	ATLANTA, GA
WXIA	ATLANTA, GA
WJBF	AUGUSTA, GA
WMAZ	MACON, GA
WTOC	SAVANNAH, GA
WLS	CHICAGO, IL
WSIL	HARRISBURG, IL
WQAD	MOLINE, IL
WIFR	ROCKFORD, IL
WPTA	FORT WAYNE, IN
WISH	INDIANAPOLIS, IN
WMT	CEDAR RAPIDS, IA
KCCI	DES MOINES, IA
KCAU	SIOUX CITY, IA
KOAM	PITTSBURG, KS
KAKE	WICHITA, KS

STATION	CITY AND STATE
WDRB	LOUISVILLE, KY
WDSU	NEW ORLEANS, LA
WBFF	BALTIMORE, MD
WJZ	BALTIMORE, MD
WMAR	BALTIMORE, MD
WBZ	BOSTON, MA
WNAC	BOSTON, MA
WCVB	BOSTON, MA
WHYN	SPRINGFIELD, MA
WGPR	DETROIT, MI
WZZM	GRAND RAPIDS, MI
WKZO	KALAMAZOO, MI
WILX	LANSING, MI
WJBX	DETROIT, MI
KCMT	ALEXANDRIA,
WHTV	MERIDIAN, MS
KMOX	ST. LOUIS, MO
KYTV	SPRINGFIELD, MO
KYUS	MILES CITY, MT
KOLN	LINCOLN, NE
WMUR	MANCHESTER, NH
KRWG	LAS CRUCES, NM
KFNW	PORTALES, NM
WTEN	ALBANY, NY
WBNG	BINGHAMTON, NY
WABC	NEW YORK, NY
WCBS	NEW YORK, NY
WOR	NEW YORK, NY
WTVH	SYRACUSE, NY
WSYR	SYRACUSE, NY
WLOS	ASHEVILLE, NC
WTVD	DURHAM, NC
WXII	WINSTON-SALEM, NC
WCPO	CINCINNATI, OH
WKYC	CLEVELAND, OH
WKEF	DAYTON, OH
WUAB	PARMA, OH
WSTV	STEUBENVILLE, OH
WDHO	TOLEDO, OH
WSPD	TOLEDO, OH
WTOL	TOLEDO, OH

STATION	CITY AND STATE
KTVL	MEDFORD, OR
KATU	PORTLAND, OR
WNEP	AVOCA, PA
WGAL	LANCASTER, PA
WPVI	PHILADELPHIA, PA
KDKA	PITTSBURGH, PA
WIIC	PITTSBURGH, PA
WTAE	PITTSBURGH, PA
WJAR	PROVIDENCE, RI
WPRI	PROVIDENCE, RI
WCBD	CHARLESTON, SC
WIS	COLUMBIA, SC
WFBC	GREENVILLE, SC
WCIV	MT. PLEASANT, SC
WBIR	KNOXVILLE, TN
WNGE	NASHVILLE, TN
WTVF	NASHVILLE, TN
WFAA	DALLAS, TX
KXAS	FORT WORTH, TX
KPRC	HOUSTON, TX
KLBK	LUBBOCK, TX
KWBT	RICHMOND, VA
KING	SEATTLE, WA
KOMO	SEATTLE, WA
KSPS	SPOKANE, WA
WSAZ	HUNTINGTON, WV
WISC	MADISON, WI

APPENDIX B

"Can't Wait" and "Avenger"

Total gross impressions of children ages 6–11 for both advertisements: 59,630,000

Total minutes of advertising broadcast from July, 1976 through September, 1977: 960 minutes

Total number of markets in which the two advertisements were broadcast: 37 markets

Total net impressions of children ages 6–11 for both advertisements: 3,619,000

APPENDIX C

STATION	CITY
WBMG	BIRMINGHAM

STATION	CITY
WBRC	BIRMINGHAM
WTVY	DOTHAN
WYUR	HUNTSVILLE
WCOV	MONTGOMERY
KTAR	PHOENIX
KVOA	TUCSIN
KATV	LITTLE ROCK
KBAK	BAKERSFIELD
KJTV	BAKERSFIELD
KNBC	LOS ANGELES
KABC	LOS ANGELES
KHJ	LOS ANGELES
KTLA	LOS ANGELES
KWHY	LOS ANGELES
KXTV	SACRAMENTO
KSCI	SAN BERNARDINO
KFMB	SAN DIEGO
KTSF	SAN FRANCISCO
KEYT	SANTA BARBARA
WFSB	HARTFORD
WHNB	W. HARTFORD
WEVU	BONITA SPRINGS
WBBH	FT. MYERS
WCIX	MIAMI
WPLG	MIAMI
WFTV	ORLANDO
WPTV	PALM BEACH
WJHG	PANAMA CITY
WTSP	ST. PETERSBURG
WXLT	SARASOTA
WCTV	TALLAHASSEE
WIVT	TAMPA
WRBL	COLUMBUS
WMAZ	MACON
KID	IDAHO FALLS
WCIA	CHAMPAIGN
WICD	CHAMPAIGN
WBBM	CHICAGO
WGN	CHICAGO
WLS	CHICAGO
WMAQ	CHICAGO

STATION	CITY
WSIL	HARRISBURG, IL
WMBD	PEORIA
WGFM	QUNICY
KHQA	QUINCY
WKJG	FT. WAYNE
WISH	INDIANAPOLIS
WRTV	INDIANAPOLIS
WTHR	INDIANAPOLIS
WTWO	TERRE HAUTE
WMT	CEDAR RAPIDS
KUPK	COPELAND
KARD	WICHITA
KTVH	WICHITA
WBKO	BOWLING GREEN
WAVE	LOUISVILLE
KALB	ALEXANDRIA
KATC	LAFAYETTE
KFLY	LAFAYETTE
KPLC	LAKE CHARLES
WDSU	NEW ORLEANS
WGNO	NEW ORLEANS
WVUE	NEW ORLEANS
WBFF	BALTIMORE
WHAG	HAGERSTOWN
WBZ	BOSTON
WCVB	BOSTON
WTEV	NEW BEDFORD
WUHQ	BATTLE CREEK
WEYI	SAGINAW
WJBK	DETROIT
KMSP	MINNEAPOLIS
KSTP	ST. PAUL
WCBI	COLUMBUS
WJTV	JACKSON
WHTV	MERIDIAN
KFVS	CAPE GIRARDEAU
KYUS	MILES CITY
KGVO	MUSSOULA
KHGI	KEARNEY
KOLN	LINCOLN
KETV	OMAHA

STATION	CITY
KVVU	BENDERSON
KLAS	LAS VEGAS
KOLO	RENO
KGGM	ALBUQUERQUE
KVIA	FARMINGTON
WSYE	ELMIRA
WHEC	ROCHESTER
WSOC	CHARLOTTE
WFMY	GREENSBORO
WGHP	HIGH POINT
WRAL	RALEIGH
WXIX	CINCINNATI
WEWS	CLEVELAND
WCMH	COLUMBUS
WDHO	TOLEDO
KETA	OKLAHOMA CITY
KWTV	OKLAHOMA CITY
KOTV	TULSA
KPTV	PORTLAND
WTAJ	ALTOONA
WLYH	LEBANON
KYW	PHILADELPHIA
WPVI	PHILADELPHIA
WIIC	PITTSBURGH
WTAE	PITTSBURGH
WSBA	YORK
WBTW	FLORENCE
KXON	MITCHELL
WDEF	CHATTANOOGA
WTVC	CHATTANOOGA
WCPT	CROSSVILLE
WATE	KNOXVILLE
WHBQ	MEMPHIS
WREG	MEMPHIS
WSM	NASHVILLE
WTVF	NASHVILLE
KBMT	BEAUMONT
WFAA	DALLAS
KVIA	EL PASO
KXAS	FT. WORTH
KRIV	HOUSTON

STATION	CITY
KHOU	HOUSTON
KENS	SAN ANTONIO
KMOL	SAN ANTONIO
KCEN	TEMPLE
KLTV	TYLER
KRGV	WESLACO
KUTV	SALT LAKE CITY
WHSV	HARRISONBURG
WSET	LYNCHBURG
WSLS	ROANOKE
KAPP	YAKIMA
WBOY	CLARKSBURG
WTAP	PARKERSBURG
WEAU	EAU CLAIRE
WMTV	MADISON
WAEO	RHINELANDER
WSAU	WAUSAU

In the Matter of

BRUNSWICK CORPORATION, ET AL.

Docket 9028. Interlocutory Order, Feb. 22, 1980

Order Denying Motion To Disqualify Counsel

By motion filed with the Secretary on December 26, 1979, respondents Brunswick Corporation and Mariner Corp. (hereinafter "Movants") move that the law firms of Mori and Ota and Pettit & Martin be disqualified as counsel for Yamaha Motor Company, Ltd. in this proceeding.[1] Movants contend that disqualification is required because of the actions of Ronald J. Dolan, a former Commission employee. For the reasons stated below, this motion is denied.[2]

I

The facts regarding this matter are set forth in Mr. Dolan's affidavits of December 14, 1979 ("Dolan Affidavit I") and January 11, 1980 ("Dolan Affidavit II"), the accuracy of which are supported by the December 14, 1979 ("Ferguson Affidavit I") and January 11, 1980 ("Ferguson Affidavit II") affidavits of John P. Ferguson; the January 9, 1980, affidavit of Jun Mori; the January 9, 1980, affidavit of Henry Y. Ota; and the December 11, 1979, affidavit of Shigeru Watanabe.

Prior to June 8, 1979, Mr. Dolan was an Assistant Director of the Commission's Bureau of Competition, and had served as the Commission's lead trial counsel in Dkt. 9028. Dolan Affidavit I ¶ 3. During his employment at the Commission, Mr. Dolan did not discuss with Mori and Ota either his own employment or the possibility that Pettit & Martin might serve as counsel for Yamaha. Dolan Affidavit II ¶ 16; Watanabe Affidavit ¶ 4. Mr. Dolan left the Commission's employment on June 8, 1979, and became employed by Pettit & Martin as "counsel" on July 2, 1979. In July 1979 an announcement of Mr. Dolan's employment by Pettit & Martin was sent to Jun Mori of Mori and Ota. Dolan Affidavit II ¶ 3.

On September 18, 1979, Mr. Mori telephoned Mr. Dolan and arranged to meet with him. *Id.* at ¶ 4. Mr. Dolan and Mr. Mori dined together on September 20, 1979, and Mr. Dolan "broached the possibility of Pettit & Martin handling some of the Washington legal business for Mori and Ota's clients." *Id.* at ¶ 5. Mr. Mori stated that the only Washington anti-trust business then being handled by his firm was the *Brunswick* matter, in which Mori and Ota alone had represented Yamaha throughout the initial trial and appeal. Mr. Mori indicated his feeling that because of Mr. Dolan's previous involvement in the proceeding at the Commission, Mr. Dolan could not participate in any such representation. Mr. Dolan responded that Pettit & Martin could handle the matter so long as he personally was screened, and he suggested that John R. Ferguson, a Pettit & Martin partner, be asked to undertake the representation. Mr. Dolan described the nature of Mr. Ferguson's qualifications. This was the first discussion between Mr. Mori and Mr. Dolan regarding the possible representation of Yamaha by Pettit & Martin. *Id.*

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[1] By motions of January 8 and 21, 1980, Movants sought a stay of the proceeding until the Commission ruled on their disqualification motion. By orders of January 18 and 23, 1980, the Commission denied these motions.

[2] The Commission having found oral argument on this motion to be unnecessary, Movants' request for such argument is denied. Movants' motion for leave to file their reply of January 21, 1980, is granted, as is Yamaha's motion for leave to file its reply of January 22, 1980.

At the time, the Commission had under consideration complaint counsel's appeal from the administrative law judge's dismissal of the complaint in this proceeding. At their September 20, 1979, meeting, Mr. Mori asked Mr. Dolan if he knew if the Commission would soon issue its decision, and Mr. Dolan replied that he did not know, but would inform Mr. Mori if he learned anything. *Id.* On October 3, 1979, Mr. Mori called Mr. Dolan to ask again if he knew whether publication of the Commission's decision was imminent. Mr. Dolan advised Mr. Mori that "rumor had it that the Commission would soon reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." *Id* at ¶ 6.

The Commission's opinion and order remanding this matter to the administrative law judge for the taking of additional evidence was issued on November 9, 1979. Mr. Dolan learned of the Commission's decision, and obtained a copy of it, on November 16, 1979. *Id.* at ¶ 7. That same day, Mr. Dolan telephoned Mr. Ota of Mori and Ota to tell him of the Commission's decision. *Id.* at ¶ 8. Mr. Ota said he had already learned of the Commission's decision from the administrative law judge's clerk, but "indicated a continuing interest in retaining Pettit & Martin to represent Yamaha." *Id.* Later that evening, Mr. Dolan informed Mr. Ferguson of his discussion with Mr. Ota, and Mr. Dolan subsequently sent a copy of Mr. Ferguson's resume to Mori and Ota. *Id.*

Since November 16, 1979, Mr. Dolan has not spoken to anyone at Mori and Ota about this matter. *Id.* Mr. Dolan's subsequent discussions with Pettit & Martin personnel about this matter have been limited to discussions to enable Pettit & Martin to evaluate the propriety of its participation in this matter. *Id.* at ¶¶ 9–14. Since he left the Commission, Mr. Dolan has had no discussion with anyone at either law firm about the pre-complaint investigation in *Brunswick*, the facts or theories involved in the litigation, trial tactics, or Commission procedures. *Id.* at ¶¶ 13–14; Ferguson Affidavit II ¶ 6; Mori Affidavit ¶ 3.

Based upon a telephone conversation between Mr. Ferguson and Mr. Ota on November 20, 1979, Pettit & Martin agreed to represent Yamaha in this proceeding. Ferguson Affidavit II ¶ 4. Yamaha retained Pettit & Martin with full knowledge that Mr. Dolan would not participate. Watanabe Affidavit ¶ 5. On November 21, 1979, Mr. Ferguson circulated a memorandum to all Washington, D.C. office personnel of Pettit & Martin[3] disclosing Pettit & Martin's representation of Yamaha and the fact that Mr. Dolan could not participate. This memorandum directed that: (i) no documents concerning this matter be shown to Mr. Dolan; (ii) no discussions concerning this matter include Mr. Dolan; and (iii) Mr. Dolan not communicate with representatives of Yamaha.

These procedures have been followed. Ferguson Affidavit I ¶ 6. Mr. Dolan will receive no added compensation from Pettit & Martin as a result of its representation of Yamaha, and if Mr. Dolan becomes a partner during the course of Pettit & Martin's representation of Yamaha, "a compensation formula will be devised so as to assure that Mr. Dolan does not share in the fees attributable to such representation." Ferguson Affidavit I ¶¶ 4–5.

II

We turn first to the broadest issue presented, whether general ethical standards require that the personal disqualification of Mr. Dolan be imputed to his law firm, under the reasoning of *Armstrong* v. *McAlpin*, 606 F.2d 28 (2d Cir. 1979) *reh. en banc granted* (No. 79-7042, Dec. 12, 1979), despite the procedures announced in Mr. Ferguson's memorandum of November 21, 1979. We hold that Pettit & Martin's enforcement of screening measures that effectively isolate Mr. Dolan from this proceeding permits the law firm to participate. We thus respectfully disagree with the reasoning in *Armstrong*.

The facts and the panel's holding in *Armstrong* may be summarized as follows: An attorney at the Securities and Exchange Commission left that agency to join a law firm. While at the SEC, he had been personally involved in an enforcement action against an individual. Later his law firm was engaged to bring a private action against that same individual. The former SEC attorney, who was concededly disqualified from the matter, was screened from any participation in the firm's representation, in accordance with the procedures set forth in Formal Opinion 342 of the American Bar Association.[4] The district court, relying upon the efficacy of the screening, denied a motion to disqualify the firm.

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[3] No employee of Pettit & Martin outside the Washington office is involved in the representation of Yamaha. Ferguson Affidavit II ¶ 5.

A panel of the court of appeals for the Second Circuit reversed. Finding a risk that the conduct of government investigation and litigation may be influenced by future employment opportunities so long as the attorney has a direct, active, and personal involvement in such matters, the panel held that the attorney's disqualification alone was insufficient to forestall that harm, or its appearance. Rather, the individual's disqualification should be imputed to the attorney's firm as well. Screening procedures were deemed by the panel to be unsatisfactory because, in the panel's view, they do not create the appearance "to the public, that there will be no possibility of financial reward" for shaping government action to enhance private employment. 606 F.2d at 34.

In so concluding, the panel focused on two factors: the possibility that the screened-out lawyer may nevertheless receive some sort of compensatory bonus or indirect share in the firm's earnings from the matter; and the belief that a firm's internal screening procedures are unlikely to be known "to casual observers" or to be persuasive to "the more informed." *Id.* Although the panel asserted that it was not attempting to formulate a general rule for imputed disqualification of a firm (*id.* at 33), it nevertheless declared that its decision did not turn on the particular facts, but on its rejection of the view that "the principle of using screening procedures to enforce DR 9-101(B) is applicable to this type of case. . . ." *Id.* at 34 n.7. Indeed, Movants would have us apply the rationale of the panel's decision in this proceeding. However, the Commission declines to accept this rationale, believing it to be incorrect in its underlying assumptions, and contrary to sound public policy.

The panel's rejection of screening procedures rests upon a chain of assumptions. Law firms adopting screening, the panel reasoned, may nevertheless provide some sort of compensation to screened attorneys attributable to the matter in which they are disqualified. Government attorneys, it was said, will be aware of this prospective benefit, and thus will continue to perceive an incentive that may influence their official actions even when they know they will be personally disqualified and screened.

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[4] Opinion 342, issued on November 25, 1975, and appearing at 62 A.B.A.J. 517 (1976), clarifies and ameliorates the effects of Disciplinary Rules 5-101(D) and 9-101(B). DR 9-101(B) bars an individual lawyer from accepting employment "in a matter in which he had substantial responsibility while he was a public employee"; and DR 5-101(D) prohibits a law firm from accepting employment in a matter if any lawyer at the firm is disqualified from that matter. Opinion 342 states that the disqualified lawyer's firm need not be disqualified if it has adopted screening measures sufficient to "effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it," so long as these measures are satisfactory to the government agency concerned, and so long as "there is no appearance of significant impropriety affecting the interests of the government." The final proposal of the District of Columbia Bar, now pending before the D.C. Court of Appeals, likewise provides for a screening mechanism. Proposed DR 9-102(B)-(D); see 3 *District Lawyer* No. 5, at 66 (April/May 1979).

The Department of Justice, in its brief *amicus curiae* on rehearing in *Armstrong*, has argued that these assumptions about lawyers' behavior were unsupported in the record of that case. We find them to be unsupported here. Screening procedures must, under ABA Opinion 342, bar direct or indirect compensation to a disqualified attorney.[5] In view of this, the probability that government lawyers will nevertheless anticipate some post-employment reward for their official actions is so low as to be without significance. Moreover, our experience does not support the panel's apparent assumption that a significant number of private firms or government attorneys will seek to evade the strictures of Disciplinary Rule 9–101(B) and Opinion 342. As the Justice Department said in its *amicus* brief, at 43:

> Government lawyers engaged in investigation and litigation know that their future employment prospects in private practice depend on other factors. These are chiefly their reputation for professional competence in their chosen specialty, their demonstrated vigor in exercising that competence solely in the public interest, and complete personal integrity. The possibility of either direct or indirect post-employment compensation for official action is thus too speculative and unsupported to outweigh the adverse impact that a total rejection [of] screening would have on the recruitment of government attorneys.

We do not share the panel's conclusion that the entire firm must be disqualified because of the "appearance" that internal screening procedures are inadequate. The standard for judging the appearance of impropriety is not governed by what "casual observers" might perceive, or by what may be unpersuasive to a skeptic. It is measured by the perception of a reasonable person. On-the-record public disclosure, as here, that a former government attorney has disqualified himself and has been screened from a firm's participation in a matter is amply sufficient to meet the test of reasonableness. Absent a showing of unethical conduct that would taint the underlying proceeding, ". . . appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Board of Education* v. *Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979). See also *Woods* v. *Covington County Bank*, 537 F.2d 904, 813 (5th Cir. 1976); *Kesselhaut* v. *United States*, 555 F.2d 791, 793 (Ct. Claims 1977).

The panel's holding is, in our view, inconsistent with the conflict-of-interest restrictions enacted by Congress in amending 18 U.S.C. 207. This statute specifically covers a former government employee's prior involvement, both directly and in a supervisory capacity. Congress declined, however, to extend the statute's restrictions, in either case, to the former government employee's current associates. In framing the scope of these restrictions, Congress explicitly considered their impact on important policy goals, such as the government's recruitment capabilities. S. Rep. No. 95–170, 95th Cong., 1st Sess. 32 (1977); H.R. Rep. No. 96–115, 96th Cong., 1st Sess. 3–6 (1979); 125 Cong. Rec. H3391–3403 (daily ed., May 16, 1979); *id.* at H3689–3698 (daily ed., May 24, 1979).

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[5] The record before us shows that Mr. Dolan is barred from such compensation. Ferguson Affidavit I ¶¶ 4–5.

Finally, we note that our rejection of any general prophylactic ban on screening devices is consistent with other recent expressions on this subject. On December 14, 1979, the Administrative Conference of the United States adopted Recommendation 79–7, "Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency." This recommendation contains a section directly addressed to the *Armstrong* issue:

> [T]he disqualification of a former employee to act in a matter ordinarily should not extend to his firm or organization. Instead, the former employee should be barred from both personal participation in the matter and receiving compensation for anyone else's work done on it. An affidavit that the former employee is thus "screened" should be submitted by a partner in the firm, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. A court should retain its authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, it should give special weight to the agency's view as to whether the "screening" arrangement affords adequate protection to its interest. 45 Fed. Reg. 2310 (Jan. 11, 1980).

In addition, the Federal Legal Council, a forum of fifteen agency general counsels established by Executive Order, adopted a resolution declaring that: "[T]he public interest, the legal profession, and the various Federal legal offices are best served by scrupulous adherence to existing laws . . . and the existing ethical guidelines of the American Bar Association (particularly Formal Opinion 342 of the A.B.A.'s Committee on Professional Ethics, which sets forth an approved screening procedure to be applied in situations such as found in the *Armstrong* case) . . . ."

Such support for the use of screening mechanisms reflects not only a considered belief in their efficacy but also a proper regard for the detrimental consequences that the *Armstrong* principle would produce. The Commission believes that a general rule of imputed disqualification without the possibility of screening would seriously impair its ability to attract qualified attorneys to its service. As the Senate Committee on Government Operations observed when it endorsed the ABA screening mechanism:

> **We have no doubt that the proposed restrictions [*i.e.*, imputed disqualification without the possibility of screening] would have a detrimental effect on the government's ability to recruit able and experienced regulators from the legal community: those with established careers might not be interested in jeopardizing later practice by a stint in government, and those without established practices may view agency service as a limitation upon future career alternatives and options. For both reasons, the effectiveness of government could be adversely affected. Study on Federal Regulations, Vol. I, 95th Cong., 1st Sess. 87 (1977).**

See also Resolution of the Federal Legal Council, *supra*, at 1–2 ("The [*Armstrong*] holding would have a serious adverse effect on the ability of Government legal offices to recruit and retain well-qualified attorneys.")

For these reasons, we decline to adopt the reasoning of the *Armstrong* panel decision in the regulation of practitioners who appear before this agency.[6] We hold that the firm of Pettit & Martin has adopted and enforced satisfactory screening procedures.[7] The firm is accordingly not automatically disqualified from participation in this matter because of the personal disqualification of Mr. Dolan.

III

We also conclude that neither law firm has violated the Commission's Rules of Practice, though as we discuss *infra*, the actions of Mr. Dolan and Pettit & Martin cause concern and prompt us to adopt, for the first time, an interpretation of our rule intended to prohibit active solicitation by a disqualified attorney which secures for his or her law firm new business from which the attorney is disqualified.

Movants contend that Mr. Dolan, Pettit & Martin, and Mori and Ota have violated Rule 4.1(b)(1). This rule prohibits former Commission employees from "appear[ing] as attorney or counsel or otherwise participat[ing] through any form of professional consultation or assistance in any proceeding or investigation, formal or informal, which was pending in any manner in the Commission while such former member or employee served with the Commission," unless the Commission authorizes such participation. Mr. Dolan has not obtained authorization to appear in this proceeding, nor could he, because he participated personally and substantially in the proceeding while at the Commission. See Rule 4.1(b)(3)(i). However, in accordance with the Rule, Mr. Dolan is not currently participating in Pettit & Martin's

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[6] We similarly decline to adopt the result in *Price* v. *Admiral Insurance Co.*, No. 78–2812 (E.D. Pa. Sept. 28, 1979), which was based upon the particular circumstances of that case and which contains no discussion of Formal Opinion 342 and the policy considerations underlying it.

[7] Under the Commission's current practice, which is consistent with the Administrative Conference recommendation, specific advance approval of a screening mechanism need not be sought.

representation of Yamaha, and Pettit & Martin has established procedures to ensure that he will not do so.[8]

Thus, the issue raised by Movants is not Mr. Dolan's current participation in the proceeding, but that of Pettit & Martin and Mori and Ota. These firms are not literally disqualified by Rule 4.1(b)(1), the terms of which expressly apply only to the activities of former employees themselves. Movants argue, however, that the law firms have violated Rule 4.1(b)(4), which states that if a former employee is disqualified from a matter, "his services shall not be utilized in any respect in such matter nor shall the matter be discussed with him in any manner by any partner or legal or business associate." Any violation of this Rule can only have occurred on or before November 16, 1979, because Mr. Dolan's only subsequent activity relating to this proceeding has involved resolution of the disqualification issue, activity that the Commission plainly did not intend to proscribe.

The primary objective of Rule 4.1(b)(4) is to require a law firm to adopt screening measures sufficient to prevent any discussion with the disqualified attorney that would aid the firm's participating attorneys in their legal representation. Pettit & Martin has done so, and the record is clear that Pettit & Martin has not utilized Mr. Dolan's services in their representation of Yamaha.[9]

The record also indicates, however, that it is unlikely that Pettit & Martin would have been retained by Yamaha had it not been for Mr. Dolan's actions. Indeed, we believe that, taken together, Mr. Dolan's course of conduct here constituted solicitation of the business in question. He "broached" to Mr. Mori the possibility of Pettit & Martin handling some of Mori and Ota's Washington legal business—though we note that this was a reference to legal business in general, and not to the particular matter from which Mr. Dolan was and is disqualified. When Mr. Mori responded that the only Washington antitrust business then being handled by his firm was the *Brunswick* matter and that Mr. Dolan could not participate in that matter because of his prior involvement as a Commission employee, Mr. Dolan explained that Pettit & Martin could handle the matter so long as he personally was screened, and he went on to suggest a particular Pettit & Martin partner for the job and to describe the partner's qualifications. At the same meeting, Mr. Mori asked Mr. Dolan whether he knew if the Commission would soon issue its decision in *Brunswick*. Mr. Dolan replied that he did not know, but would inform Mr. Mori if he heard anything. A few days later Mr. Mori called Mr. Dolan to ask again whether he knew if the publication of the decision was imminent, and Mr. Dolan replied that "rumor had it that the Commission would soon reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." Mr. Dolan then telephoned Mr. Ota shortly after the Commission decision in *Brunswick* was issued, and subsequently sent a copy of the previously mentioned partner's resume to Mori and Ota.

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[8] We also conclude that even if Mr. Dolan's actions prior to November 21, 1979, contravened Rule 4.1(b)(1), we would reach the same determination set forth below with respect to disqualification of the firms.

[9] We note that Mori and Ota could not be viewed as "legal or business associates" of Mr. Dolan, as that phrase is used in Rule 4.1(b)(4), before they retained Pettit & Martin as co-counsel on November 20, 1979.

Given the likelihood that Pettit & Martin obtained the business in question as a result of Mr. Dolan's activities, the question under Rule 4.1(b)(4) is whether Mr. Dolan's solicitation of Mori and Ota constituted "services" which Pettit & Martin "utilized in any respect" in the *Brunswick* matter. The quoted language is ambiguous. The most apparent meaning is that when an attorney is disqualified from participating in a matter, he may not aid his firm in any manner in its provision of legal representation in that matter. It is not clear whether the language also means that an attorney who is disqualified in a matter is prohibited from seeking to obtain that matter for his firm. The Commission has not previously construed the language, and the "legislative history" of the rule provides no guidance.[10]

We decline to find, therefore, that Pettit & Martin violated Rule 4.1(b)(4)—as the rule would reasonably have been understood—when it obtained the *Brunswick* matter as a result of Mr. Dolan's solicitations on the firm's behalf. We do so because the vague language of the rule, together with the absence of any interpretation of it, fails to provide adequate notice that conduct of the kind under consideration here constitutes a violation. In addition, we note that our decision not to disqualify Pettit & Martin rests on a finding that Mr. Dolan's conduct has resulted in no actual impropriety. Mr. Dolan has provided no aid to Pettit & Martin in its representation of Yamaha in this proceeding. And Movants do not state, nor do we discern, how Mr. Dolan's conduct has itself affected the course of this proceeding in any way or how it has injured them. See *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Board of Education* v. *Nyquist, supra*, 590 F.2d at 1246. Moreover, there is no allegation that Mr. Dolan has received additional compensation for having brought this business to his firm, or that he pursued his responsibilities at the Commission with anything less than the customary vigor of complaint counsel.

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[10] When Rule 4.1(b)(4) was orginally adopted, it contained a procedure for Commission approval of law firm participation in a matter only after review of an affidavit showing no use by the law firm of the disqualified attorney's services in any respect in such matter and no fee-splitting, and only after a Commission finding that the firm's participation would entail no "actual or apparent impropriety." 32 FR 8456 (June 13, 1967). When the present language of the rule was adopted in 1975, the Federal Register notice simply stated that the revision "eliminate[d] the requirement for filing affidavits in a case in which a former Commission member or employee is prohibited from appearing or participating in a Commission proceeding or investigation, and his partner(s) or associate(s) desire to appear or participate therein without utilizing his services." 40 FR 15236 (April 4, 1975).

However, our conclusion here—that disqualification would be unfair given the ambiguous and previously uninterpreted language of Rule 4.1(b)(4)—should not be perceived as approval of Mr. Dolan's behavior and Pettit & Martin's acquiescence in it. To the contrary, serious ethical concerns arise from affirmative actions by a disqualified attorney designed to bring to his firm new business directly related to a matter from which the attorney is disqualified.

The appearance of impropriety in such a situation might manifest itself in two ways. An observer might suppose that the attorney had been unwarrantedly solicitous to a potential client while still with the government, to inspire gratitude or good feelings in that client and thereby pave the way toward bringing the client's business to the attorney's new firm. Or, the observer might surmise that if the client retained the disqualified attorney's new firm at the behest of the attorney, it would do so to obtain that attorney's services surreptitiously, notwithstanding supposed screening devices.

There is no countervailing policy reason in support of a law firm obtaining business from the active solicitation of an attorney who is disqualified from such business. We do not believe firms should expect that government lawyers will bring into the firm business from which the former government lawyer is personally disqualified. Similarly, our concern for the rights of clients to counsel of their choice is greatly diminished where they are led to retain a firm to represent them through the intercession of a former government attorney who is personally disqualified from representing them.

The Securities and Exchange Commission has adopted a specific rule dealing with this situation. 17 CFR 200.735-8. At such time as we conclude our rulemaking on comprehensive revisions of Rule 4.1(b),[11] we will adopt a comparable rule. In the interim, we shall make the applicability of the current rule clear: If a private party asks a former Commission attorney to provide legal representation in a matter from which the attorney is disqualified, the disqualified attorney may state that he is disqualified and recommend another attorney, even an attorney in his or her own firm. In such a situation, the disqualified attorney is a mere passive recipient of an inquiry, and we see no ethical problem in referring the matter on to someone else. But henceforth, any firm which obtains a matter through the active solicitation of an attorney who is disqualified from that matter, will be considered to have utilized that attorney's services in the matter in violation of Rule 4.1(b)(4).

For the foregoing reasons, *it is ordered*, That the petition of respondents Brunswick Corporation and Mariner Corp. to disqualify the firms of Mori and Ota and Pettit & Martin is hereby denied.

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[11] 43 FR 35947 (Aug. 14, 1978); 44 FR 45179 (Aug. 1, 1979).

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

Docket 9074. Interlocutory Order, Feb. 25, 1980.

DENIAL OF INTERVENOR'S MOTION FOR ACCESS TO CONSENT ORDER

By motion filed February 12, 1980, intervenor, the National Automobile Dealers Association ("NADA") has requested that the Commission (1) grant NADA access to the consent order signed by General Motors Corporation and General Motors Acceptance Corporation ("the GM Respondents"), including all supporting documents; (2) vacate the Commission order dated January 23, 1980, withdrawing this matter from adjudication as to the GM respondents and remand the matter to the administrative law judge; and (3) if the order is not vacated, grant NADA thirty days within which to comment on the proposed consent order before the Commission determines whether or not to accept the order pursuant to Section 3.25(f) of its Rules of Practice. Complaint counsel have opposed the motion.

In support of its motion, NADA observes that it was not served with the joint motion of complaint counsel and the GM Respondents, dated December 28, 1979, to withdraw this matter from adjudication, and that it was, thereby, precluded from objecting to or otherwise taking action on the motion.

It does appear that NADA was not served with the joint motion. However, because of the unusual nature of the motion involved, it does not appear that there has been any prejudice to NADA from the failure to make service, and, accordingly, there is no need, nor would any purpose be served, by restoring this matter to adjudication.

The Commission's Rules of Practice, Section 3.25(c), prescribe that where both complaint counsel (including the appropriate Bureau Director) and any respondent to an adjudication have executed a consent agreement, the Secretary *shall* issue an order withdrawing the matter from adjudication with respect to such respondent(s). Withdrawal is not discretionary on the Secretary's part, and, accordingly, no objection that NADA might have raised could possibly have altered the outcome of the motion. Similarly, restoration of this matter to adjudication would simply result in the matter again being withdrawn therefrom, regardless of what objection NADA might interpose.[1]

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[1] It should be noted that inasmuch as the Secretary is *required* to withdraw from adjudication as to consenting respondents any matter as to which the requisite consent has been signed, the issuance of an order to withdraw will often occur almost *simultaneously* with the filing of the motion to withdraw. In most cases, therefore, parties to a matter other than the joint movants (complaint counsel and the consenting respondent) will receive service of the joint motion to withdraw at the same time they receive the order granting it. In this case, it appears that the motion to withdraw was filed prior to the time the Bureau Director signed the consent agreement, and several weeks elapsed

(Continued)

With respect to NADA's alternative request that it be shown a copy of the consent order and be given 30 days within which to comment upon it prior to the time any decision is made by the Commission as to whether it should be accepted, the Commission finds the situation identical to that which arose with respect to Dkt. 9073, wherein the same request by NADA was denied. The Commission believes that if the proffered consent order should be accepted, the 60-day public comment period will provide ample opportunity for NADA to make its views with respect to the order known, and any such views that it may submit will be given fullest consideration by the Commission.

Therefore, *It is ordered*, That intervenor NADA's motion is hereby denied.

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before that signature was obtained and the Secretary could issue the order to withdraw. Technically, this premature motion to withdraw should have been served upon intervenor NADA, but we cannot see how the failure to do so deprived it of any right it would otherwise have had.

IN THE MATTER OF

THE SOUTHLAND CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9127. Complaint, April 26, 1979—Decision, Feb. 25, 1980

This consent order requires, among other things, The Southland Corporation (Southland), a Dallas, Texas dairy processor, to refrain for seven years from acquiring, without prior Commission approval: 1) any fluid milk processing plant, distribution facility or route within a 150-mile radius of a Southland fluid milk processing plant or distribution facility; 2) any such company or plant located within a 150- to 500-mile radius of a Southland fluid milk processing plant or distribution facility, which processed more than 26 million pounds of Class I milk within any of the three years prior to the acquisition; or 3) any fluid milk processing company that processes 300 million pounds of Class I milk annually.

Appearances

For the Commission: *James R. Chamberlain* and *Robert C. Cheek.*

For the respondents: *Peter K. Bleakley, Arnold & Porter,* Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an acquisition agreement, which, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

1. For the purpose of this complaint, the term "San Antonio market area" refers to the Office of Management and Budget's Standard Metropolitan Statistical Area for San Antonio, Texas which is composed of the three counties of Bexar, Comal, and Guadalupe.

II. THE SOUTHLAND CORPORATION

2. The Southland Corporation ("Southland") is a corporation organized and existing under the laws of the State of Texas with its principal office at 2828 North Haskell Ave., Dallas, Texas.

3. Southland is a major operator and franchisor of convenience food stores doing business almost exclusively under the "7-Eleven" brand name. As of December 31, 1977, Southland owned or franchised 6,357 convenience food stores throughout forty states, the District of Columbia, and Canada.

4. Southland is also one of the nation's largest dairy processors. Since 1960, Southland has acquired approximately twenty-nine other dairy processors and currently sells packaged fluid milk in thirty states and the District of Columbia under twelve strong regional brand names. In 1978 Southland processed over one billion pounds of packaged fluid milk.

5. In the fiscal year ending December 31, 1977, Southland reported total net sales of $2,536,109,000 of which approximately $344,807,000 were packaged fluid milk products.

III. KNOWLTON'S, INC.

6. Knowlton's, Inc. ("Knowlton's") is a corporation organized and existing under the laws of the State of Texas with its principal office at 1314 Fredericksburg Road, San Antonio, Texas.

7. Knowlton's, a family owned firm, is the largest, or one of the largest, independent dairy processors in the San Antonio market area. In 1978, Knowlton's processed approximately 44,857,000 pounds of packaged fluid milk.

8. Knowlton's also owns and operates nine milk and ice cream stores in the San Antonio market area.

9. In 1978 Knowlton's reported $10,988,416 total net sales of which $4,009,000 were packaged fluid milk products.

IV. JURISDICTION

10. At all times relevant herein, Southland and Knowlton's have engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, and their activities, including those challenged herein, are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended.

V. THE ACQUISITION AGREEMENT

11. On or about January 31, 1979, Southland and Knowlton's entered into an agreement whereby Southland would acquire 100% of Knowlton's assets, including the dairy processing plant and the nine milk and ice cream stores, for approximately $3.3 million. The acquisition is scheduled to be consummated on April 30, 1979.

VI. TRADE AND COMMERCE

12. The relevant line or relevant lines of commerce are the processing, distribution and sale of packaged fluid milk and the processing and wholesale distribution of packaged fluid milk.

13. A relevant section of the country is the San Antonio market area.

14. The lines of commerce described in Paragraph 12 in the San Antonio market area are highly concentrated.

VII. ACTUAL COMPETITION

15. From its Oak Farms plants in Dallas and Houston, Southland ships packaged fluid milk to its distribution center in San Antonio, Texas. Southland then sells packaged fluid milk from this distribution center throughout the San Antonio market area.

16. Knowlton's sells packaged fluid milk in the San Antonio market area from its one plant located in San Antonio.

17. Southland and Knowlton's are presently and have been for many years actual competitors for packaged fluid milk sales in the San Antonio market area.

VIII. EFFECTS: VIOLATIONS CHARGED

18. The effects of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant markets, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition agreement is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Southland and Knowlton's for packaged fluid milk sales in the San Antonio market area will be eliminated;

(b) already high levels of concentration will increase;

(c) Knowlton's, the largest, or one of the largest, independent dairies in the market and a known price competitor will be eliminated from competition; and

(d) additional acquisitions and mergers between dairy processors may be fostered, causing a further substantial lessening of competition and increasing concentration.

19. The acquisition, if consummated, would for the reasons set forth herein, constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

20. By entering into the agreement which would give rise to the violation described in Paragraph 18, herein, Southland and Knowlton's have violated Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. 45.

Commissioner Pitofsky did not participate.

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The Southland Corporation is a corporation organized, existing and doing business under and by virtue of the laws of

the State of Texas with its office and principal place of business located at 2828 N. Haskell Ave., Dallas, Texas.

Respondent Knowlton's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 1314 Fredericksburg Road, San Antonio, Texas. Since on or about June 15, 1979, all of Knowlton's assets have been owned by Southland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order the following definitions shall apply:

(a) "Class I Milk" means packaged fluid whole milk, partially skim milk (approximately 2% butterfat or less), skim milk, buttermilk, cultured fluid milk products (except yogurt), flavored milk, and flavored milk drinks.

(b) "Southland" refers to The Southland Corporation, its subsidiaries, divisions, affiliates, successors and assigns.

I.

It is ordered, That Southland shall refrain, for a period of seven (7) years from the date of service upon it of this order, from acquiring, directly or indirectly, without prior approval of the Federal Trade Commission: (i) Any fluid milk processing plant, distribution facility or route (except those serving fluid milk processed by Southland exclusively) within a 150-mile radius of a Southland fluid milk processing plant or distribution facility; (ii) Any fluid milk processing company or plant located within a radius of between 150 and 500 miles of a Southland fluid milk processing plant or distribution facility which in any of the three years prior to the acquisition processed more than 26 million pounds of Class I milk; or (iii) Any fluid milk processing company that processes 300 million pounds of Class I milk annually; *provided, however*, that if the Federal Trade Commission at any time during the seven (7) year period of this order should modify its Criteria for Assessing Future Mergers, as set forth in the Commission's Enforcement Policy With Respect to Mergers in the Dairy Industry, the Commission will modify this order to conform to the modified Criteria.

II.

It is further ordered, That Southland shall within thirty (30) days after service upon it of this order file with the Commission a report setting forth in detail the location of its existing fluid milk processing plants, distribution facilities and routes (including those operated by Knowlton's). Thereafter annually for seven years, Southland shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order and shall include in such report a current list of Southland's fluid milk processing plants, distribution facilities and routes.

III.

It is further ordered, That Southland shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change which may affect compliance obligations arising out of this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

FORD MOTOR COMPANY, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9073. Decision, March 29, 1979—Modifying Order, Feb. 26, 1980

This order reopens and modifies a consent order issued on March 29, 1979, 44 FR 25630, 93 F.T.C. 402, so that Paragraph II (C) (7) of the order provides for a waiver of customers' surplus rights in the event that a dealership retains a repossessed vehicle for its own use, rather than for resale. This brings the order into conformity with one aspect of an order issued against Francis Ford, Inc. on September 21, 1979 under the same docket number, 44 FR 62481, 94 F.T.C. 564.

ORDER REOPENING AND MODIFYING CONSENT ORDER

By petition of November 26, 1979, respondents Ford Motor Company and Ford Motor Credit Company (hereafter "Ford respondents") have asked the Commission to modify Paragraph II C.(7) of the consent order entered by the Commission against these respondents on March 29, 1979, in order to conform with a less restrictive provision of the litigated order in this docket entered against respondent Francis Ford, Inc. on September 21, 1979. An "Order to Show Cause" as to why the requested change should not be made, dated January 15, 1980, has elicited no objection.

Paragraph VII B. of the consent order provides that if a final order is issued in Dkts. 9073, 9074, or 9075 that imposes less restrictive standards in certain enumerated respects than does the consent order, the Commission shall reopen the consent order within 120 days of a petition to do so and modify the consent order to conform with the less restrictive provisions contained in the other order.

Although the less restrictive order upon which Ford respondents rely for their request has not yet become final, due to the pendency of an appeal, no purpose would be served by delaying modification of the Consent Order until such time as the appeal is resolved, inasmuch as the appeal by Francis Ford is hardly likely to result in imposition of a *more* restrictive standard than the Commission has imposed. Modification now will expedite achievement of uniform treatment of automobile dealers which is a primary purpose of Paragraph VII B. Therefore,

It is ordered, That the consent order in this docket be reopened for the limited purpose of effecting the following changes.

It is further ordered, That Paragraph II of the consent order be modified to eliminate the following language:

C. The accounting system shall provide that:

7. Dealers are not to obtain waivers of surplus or redemption rights from repurchase financing customers.

It is further ordered, That Paragraph II of the consent order be modified to add the following language:

C. The accounting system shall provide that:

7. Dealers are not to take any action to obtain or to attempt to obtain or bring about a waiver of a customer's right to redeem, except in the precise manner and circumstances contemplated by the applicable state law version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless the dealer intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business. If a waiver is sought, the dealer shall not represent that by proposing the waiver, it proposes to forego its right to a deficiency judgment, unless it intends to seek such a judgment should the waiver not be given. No customer's waiver of rights or failure to object to any secured party's proposal to retain the repossessed vehicle, unless procured in exact conformity with this subparagraph, shall limit the provisions of the accounting system relating to accounting for and paying any surplus.

IN THE MATTER OF

HASTINGS MANUFACTURING COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2(A) OF THE CLAYTON ACT

Docket 4437. Decision, Dec. 9, 1944—Modifying Order, Feb. 28, 1980

This order modifies an order issued on December 9, 1944, 10 FR 773, 39 F.T.C. 498, by deleting the phrase "or all such products of any competitor of respondents" from the second paragraph of the original order which barred respondent from offering stock lifts as an inducement to dealers to carry its products exclusively or in place of a competing line stocked by the dealer. The revised order prohibits only stock lifts to induce exclusive dealing arrangements.

ORDER MODIFYING ORDER TO CEASE AND DESIST

Following extensive briefing by respondent Hastings Manufacturing Company and the Commission's Bureau of Competition, the Commission on December 20, 1979, issued an order to show cause why the cease and desist order issued in this proceeding in 1944[1] should not be modified. The Commission stated that stock lifting, when not employed to induce exclusive dealing arrangements, ordinarily is an unobjectionable form of competition by suppliers for dealers.[2] Little different from a price discount, stock lifting is likely to promote price competition and, if the market is otherwise competitive, ultimately benefit the consumer. The Commission concluded that it appeared to be in the public interest to modify the 1944 order so that it would no longer prohibit stock lifting for purposes, or with effects, other than to induce exclusive dealing. The show cause order invited interested parties to comment on the proposed change.

The Commission having considered the comments submitted by several members of the public,[3]

Now, therefore, *it is hereby ordered*, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)) and Rule 3.72(b) of the Commission's Rules of Practice (16 CFR 3.72(b)), That the 1944 cease and desist order be modified in part as follows (deleted language is hyphened out):

It is ordered, That respondent Hastings Manufacturing Co., its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of piston rings and other automotive replacement parts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from doing, directly or indirectly any of the following acts or things (when done as an inducement to the distributor of automotive parts concerned to discontinue handling all products competitive with respondent's and thereafter handle respondent's products in lieu thereof, or when done upon any express or implied condition, agreement, or understanding that such distributor will discontinue handling all products competitive with those of respondent, ~~or all such products of any competitor of respondent~~, and will handle respondent's products in lieu thereof):

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[1] Hastings Mfg. Co., 39 F.T.C. 498, 509 (1944).

[2] The Commission noted that there are exceptions. For example, stock lifting to encourage dealers to carry the stock lifter's goods in place of one of several existing lines might violate Section 3 of the Clayton Act (15 U.S.C. 14) if the practice's effect might be to substantially lessen competition. In addition, if the stock lifter possessed monopoly power and its stock lifting functioned as a form of predatory pricing, the practice might constitute monopolization.

[3] Neither the respondent nor the Bureau of Competition filed comments in response to the order to show cause.

1. Purchasing from any distributor or prospective distributor of respondent's piston rings or other replacement parts his stock, or stocks recalled by him from his customers, of the products of another manufacturer which are competitive with respondent's products.

2. Making any loan to a distributor or prospective distributor of respondent's piston rings or other replacement parts.

3. Guaranteeing to distributors or prospective distributors of respondent's piston rings or other replacement parts increased gross profits from the handling of respondent's products as compared with gross profits previously obtained from the handling of products competitive with those of respondent.

IN THE MATTER OF

ARTHUR MURRAY, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7845. Decision, July 26, 1960—Modifying Order, March 10, 1980

This order modifies an order issued on July 26, 1960, 25 FR 9673, 57 F.T.C. 306, by inserting a Roman numeral one before the preamble of the original order; vacating the *It is further ordered* paragraph therein; and adding new Parts II, III, IV and V. The modified order strengthens the 1960 order by giving consumers the right to unilaterally cancel contracts with the company and receive prescribed refunds within 30 days of cancellation. Respondent is additionally required to direct franchisees and sub-franchisees to comply with the terms of the order, institute a program of continuing surveillance designed to reveal non-conformers, and terminate dealings with such parties.

ORDER MODIFYING ORDER TO CEASE AND DESIST

The Commission on September 18, 1979, issued its order to show cause why this proceeding should not be reopened and its order of July 27, 1960 (hereafter sometimes referred to as "the Commission Order of 1960"), modified.

Respondents having consented to the reopening of this proceeding and the modification of the Commission Order of 1960, as set forth in the show cause order and the Commission having considered the comments filed by interested persons,

Now, therefore, *it is hereby ordered*, That the Commission Order of 1960 be, and it hereby is, modified by inserting a Roman numeral one, I, before the preamble of the Commission Order of 1960, by vacating the *It is further ordered* paragraph therein, and by adding new Parts II, III, IV, and V so that the Modified Order will read as follows:

ORDER

I.

It is ordered, That respondent Arthur Murray, Inc., a corporation, and its officers, and respondents Arthur Murray, Kathryn Murray and David A. Teichman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, or through any licensee, in connection with the solicitation, advertising or sale of dancing instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by means of radio or television broadcasts, newspaper advertisements, contracts, telephone quizzes, crossword, dizzy dance or zodiac puzzles, "Lucky Buck" contests, or any certificates relating thereto, or any other means, that a course of dancing instruction or a specified number of dancing lessons, or any other service or thing of value, will be furnished free of charge, at a reduced price, or for any price, unless the period or periods of *bona fide* dancing instruction or other service or thing of value is in fact furnished as represented.

2. Refusing to honor the terms and provisions of any certificate, award or offer.

3. Using (a) by telephone any quiz, puzzle, contest or other device which purports to involve, or is represented as involving, skill, competition or special selection; (b) by other means any promotion which purports to be a *bona fide* quiz, puzzle, contest or other device involving skill, competition or special selection is not involved; or (c) any *bona fide* quiz, puzzle, contest or similar device when a purpose of such promotion is to obtain leads to prospective customers and such purpose is not fully and conspicuously disclosed in the announcement or description of such promotion.

4. Using in any single day "relay salesmanship", that is consecutive sales talks or efforts of more than one representative, with or without the employment of hidden listening devices, to induce the purchase of dancing instruction.

5. Using "analyses," "tests," "studio competitions," "dance derbies," or any other artifices purportedly designed to evaluate dancing ability, progress or proficiency when said artifices are not so designed or so used but are in fact to induce the purchase of dancing instruction.

6. Requesting pupils or prospective pupils to sign uncompleted contracts or agreements; evading or refusing to answer inquiries concerning amount due or payable on proposed or completed contracts or agreements; or misrepresenting to pupils or prospective pupils what is or will be due or payable.

7. Falsely representing to or assuring pupils or prospective pupils that a given course of dancing instruction will enable him or her to achieve a given standard of dancing proficiency.

8. Contracting with a pupil or prospective pupil for a specific course of dancing instruction and thereafter, prior to the completion of the given course, subjecting such pupil or prospective pupil to sales effort toward the purchase of additional lessons, unless (a) any contract for additional lessons is subject to cancellation by such pupil or prospective pupil, with or without cause, at any time up to and including one week after the completion of the units of dancing

instruction previously contracted for, without cost or obligation, except that a charge may be made for not in excess of two additional lessons furnished during such week and (b) all of such units previously contracted for shall be used or completed prior to the commencement of the additional lessons.

9. Using any technique or practice similar to those set out in paragraphs 4 through 8 hereof to mislead, coerce, or induce by other unfair or deceptive means the purchase of dance instruction.

II.

For purposes of this part the following definitions shall be applicable:

"Total contract price" shall mean the total cash price paid or to be paid by the pupil or prospective pupil for the dance instruction or dance instruction services which are the subject of the contract or written agreement.

"Notice of cancellation" shall be deemed to have been provided by a pupil or prospective pupil by mailing or delivering written notification to cancel the contract or written agreement or by failing to attend instructional facilities for a period of five consecutive appointment days on which classes or the provision of services which are the subject of the contract or written agreement were prearranged with the pupil or prospective pupil.

"Reasonable and fair service fee" shall mean no more than 10% of the total contract price for contracts of $1,000 and under. For contracts over $1,000, "reasonable and fair service fee" shall mean no more than $100 plus an amount equal to 5% of the total contract price over $1,000 (not to exceed $250 in total).

It is further ordered, That respondent Arthur Murray, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, or through any licensee, in connection with the solicitation, advertising or sale of dance instruction or dance instruction services which are the subject of a contract or written agreement, do forthwith cease and desist from:

1. Entering into any contract or written agreement for dance instruction or dance instruction services which are the subject of the contract or written agreement unless it clearly and conspicuously discloses in the exact language below that:

> **This agreement is subject to cancellation at any time during the term of the agreement upon notification by the student. If this agreement is cancelled within three business days, the studio will refund all payments made under the agreement. After three**

business days, the studio will only charge you for the dance instruction and dance instruction services actually furnished under the agreement plus a reasonable and fair service fee.

2. Failing to refund to a pupil or prospective pupil who cancels any contract or written agreement within three business days from the date on which the contract or written agreement was executed, all payments made by the pupil or prospective pupil. Such refunds shall be provided, and any evidence of indebtedness cancelled and returned, within 30 days after receiving notice of cancellation.

3. Receiving, demanding, or retaining more than a pro rata portion of the total contract price plus a reasonable and fair service fee where a pupil or prospective pupil cancels any contract or written agreement after three business days from the date on which the contract or written agreement was executed and within the term of the said contract or written agreement. Seller must, within thirty (30) days of notice of cancellation, provide any refund payment due to the pupil or prospective pupil or must cancel that portion or the pupil's or prospective pupil's indebtedness that exceeds the amount due. The pro rata portion shall be calculated in the following manner:

(a) For the time period preceding notice of cancellation, there must be calculated the number of hours or lessons of dance instruction or dance instruction services received or attended by the pupil pursuant to the contract or written agreement.

(b) This number must be divided by the total number of hours or lessons of dance instruction or dance instruction services which are the subject of the contract or written agreement.

(c) The resulting number shall be multiplied by the total contract price.

(d) For contracts combining a course of dance instruction with dance instruction services, separate prices for the dance instruction and the dance instruction service portions must be designated and the pro rata portion of the total contract price shall be the sum of the separate pro rata obligations for the dance instruction portion and the dance instruction service portion.

4. Misrepresenting in any manner to any pupil or prospective pupil any of the provisions of this order.

III.

It is further ordered, That nothing contained in the Modified Order to cease and desist shall be construed to relieve respondent from complying with any provision of any federal, state, or local law, rule, regulation, or order which affords greater protection to pupils or prospective pupils than the comparable provision of the Commission's order or to waive any legal rights the pupil or prospective pupil may have under the various jurisdictions.

IV.

It is further ordered, That:

1. Respondent corporation deliver a copy of this order to each of its present and future franchisees or sub-franchisees, with directions that such persons promulgate and enforce same.

2. Respondent obtain from each person described in sub-paragraph 1 above a signed statement setting forth his/her intention to conform his/her business practices to the requirements of this order; if respondent is unable to obtain such signed statements, respondent shall notify the Federal Trade Commission of the name of the franchisee or sub-franchisee which will not sign such a statement and report the reason therefore to the Federal Trade Commission.

3. Respondent institute a program of continuing surveillance adequate to reveal whether the business operation of each person described in subparagraph 1 above conforms to the requirements of this order; and

4. Respondent discontinue dealing with or terminate the use or engagement of any person described in subparagraph 1 above who continues, after notice, to engage in a continuous course of conduct involving acts or practices prohibited by this order as revealed by the aforesaid program of surveillance. Respondent is permitted to effect such termination in accordance with applicable state laws in those states which have statutes governing franchise termination.

V.

It is further ordered, That:

1. Respondent corporation forthwith distribute a copy of this order to each of its operating divisions.

2. Respondent corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

3. Respondent corporation, within one hundred fifty (150) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, March 10, 1980

Order denying respondent's motion for review of ALJ's order of Sept. 6, 1979 removing certain exhibits from *in camera* status.

ORDER

General Foods Corporation applies for review of the administrative law judge's order of September 6, 1979, removing certain exhibits from *in camera* status. Pursuant to Commission Rule Section 3.23(b), the law judge certified this appeal to the Commission.

General Foods contends that certain exhibits which disclose cost and profitability information for 1971–1977 for brands of General Foods coffee, a cost accounting manual and an accounting and financial manual used by General Foods constitute trade secrets or confidential commercial information, and that their disclosure is prohibited by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f). Even if they are not trade secrets within the meaning of Section 6(f), General Foods contends that the documents contain confidential information which 18 U.S.C. 1905 forbids the Commission from disclosing unless the disclosure is authorized by law. General Foods argues that the Commission has disclaimed Section 6(f) as a source of authority for disclosures in adjudicative proceedings, citing our opinions in *Bristol-Myers Company*, 90 F.T.C. 455 (1977), and *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961). Finally, General Foods claims that even if disclosure is not prohibited by Section 6(f) of the FTC Act or 18 U.S.C. 1905, application of the criteria in *Bristol-Myers* and *Hood* warrants *in camera* treatment.

We hold that the exhibits at issue do not contain "trade secrets" within the meaning of Section 6(f). As we have recently stated, the legislative history and purposes of the FTC Act demonstrate that the phrase "trade secrets" is primarily limited to secret formulas, processes, and other secret technical information. See *Statement Concerning Nonpublic Disclosure to State Attorneys General of Information Obtained by the Commission*, in *Interco, Inc.*, D. C–2929, at 12–20 (November 9, 1979); *Hood, supra*, 58 F.T.C. at 1188–89. See also *Interco, Inc.* v. *FTC*, Civ. Action No. 78–2486 (D.D.C. December 21, 1979), where the court accepted the Commission's interpretation of "trade secrets" within the meaning of Section 6(f).[1]

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[1] In any event, we reiterate here that the prohibition on disclosure of "trade secrets" contained in Section 6(f) does not apply to adjudicative proceedings. *Bristol-Myers*, 90 F.T.C. at 456 n. 2; *Hood*, 58 F.T.C. at 1185–86 and n. 1.

It is also doubtful that this information falls within 18 U.S.C. 1905. Both the House Committee on Government Operations and the Justice Department have stated that Section 1905 should not be construed more broadly than the three relatively narrow statutes that were consolidated into Section 1905. Accordingly, they have stated that Section 1905 applies only to narrow categories consisting of tax information, trade secrets, and confidential information acquired for statistical purposes. See H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 58 (1978); Supplemental brief for defendants-appellees at 1-16, filed in *Chrysler Corp.* v. *Brown*, No. 76-1907 (3d Cir.) on July 17, 1979. Thus, these exhibits do not appear to come within Section 1905.

We need not reach a definitive resolution of the Section 1905 question, however, since Section 1905 only prohibits disclosure of information "to any extent not authorized by law." *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). The FTC Act, 15 U.S.C. 41, *et seq.*, provides inherent authority for disclosure of information in the course of adjudicative proceedings. See *E. Griffiths Hughes, Inc.* v. *FTC*, 63 F.2d 362 (D.C. Cir. 1963). For example, Section 5(b) of the Act allows interested parties to intervene and requires the Commission to report its findings in adjudicative proceedings. Because disclosure of evidence is necessary to carry out our duties under Section 5 of the FTC Act, such disclosures are authorized for purposes of 18 U.S.C. 1905.

General Foods' alternative claim is that these exhibits warrant *in camera* treatment. The administrative law judges have broad discretion in determining what information should be placed *in camera* and we do not ordinarily disturb their determinations "except on the basis of a showing of abuse." *Eaton, Yale & Towne*, 79 F.T.C. 998, 1001 (1971); *Hood*, 58 F.T.C. at 1185.

The ALJ denied *in camera* treatment to a number of charts prepared by an expert witness and to General Foods documents showing profits, breakdowns of various costs, sales, and assets relating to several brands of General Foods coffee for the years 1971-1977 (data are provided through March 1977). General Foods contends that these data were compiled at great expense and that they would give competitors significant insights into General Foods' strengths and weaknesses. However, as the law judge correctly noted, we place a greater burden on a respondent when the information is old; here, most of the information is more than three years old. The Commission has usually denied *in camera* treatment for data of that vintage.[2] General Foods does not make a convincing showing that such data

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[2] See, *e.g.*, *Crown Cork & Seal Company*, 71 F.T.C. 1714, 1715 (1967) (two-and-a-half to six-year-old sales data denied *in camera* treatment); *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 177-180, 334-35 (1967) (*in camera* treatment for sales data, especially five-year-old data, criticized by Commission); *Reuben H. Donnelley Corporation*, D. 9079 (order of Oct. 25, 1977) (*in camera* treatment of relevant two-year-old revenue data denied); see also *United*

(Continued)

would provide significant insight into its strengths and weaknesses. Indeed, General Foods consented to placement on the record of similar data for 1971 through 1973.

With regard to detailed profit and expense information for 1976-1977, there is evidence that estimates of these figures may be available to competitors from outside sources, and that General Foods has access to similar data about its competitors.[3] It is possible that General Foods might have made a sufficient showing to warrant *in camera* treatment for a temporary period[4] had it provided more detailed information concerning the following factors, *inter alia:*

(1) Whether General Foods knows what estimates of its sales, profits, and costs are available and generally how accurate those estimates are.

(2) What degree of detail may be obtained from public sources, such as General Foods' financial statements[5] or estimates based on known frequency of and rates for public media advertising.

(3) How many employees have how much information about current financial data, and whether such employees have recently left General Foods' employ.[6]

With regard to General Foods' financial and accounting manuals, respondent's showing is rather conclusory. Certainly if these manuals represented a significant work product, compiled at great expense, disclosure of which would give other companies the benefit of General Foods' labors, *in camera* treatment might be warranted. *Bristol-Myers,* 90 F.T.C. at 456. We are unable to discern from the evidence before us whether similar procedures are likely to be employed by other companies or, if there are significant differences, whether these procedures are so uniquely adapted to General Foods' operations that they would be of little use to other companies. *Id.* Thus, we cannot disagree with the ALJ's determination on this issue.

States v. *International Business Machines Corp.*, 67 F.R.D. 40, 47–49 (S.D.N.Y., 1975) (*in camera* treatment denied for three-year-old revenue, sales and manufacturing data). General Foods' assertion of confidentiality based on complaint counsel's belief that the data are relevant is frivolous.

[3] General Foods argues that the fact that complaint counsel sought information directly from it rather than relying on generally available information demonstrates that such information is not useful to competitors. We do not believe, however, that General Foods would disagree that sound administrative practice may require that a Commission order be based when possible on information that is more accurate than estimates upon which a competitor might reasonably rely in conducting its business.

[4] Where serious competitive injury may result from disclosure, or even where the issue is a close call, a useful procedure that may be employed is to grant *in camera* treatment for a period of years unless earlier public disclosure is deemed relevant in an opinion on the merits. See, *e.g. Brunswick Corp.* (Dkt. 9028, order of Jan. 12, 1977). The Commission also noted the availability of this procedure in *Bristol-Myers, supra,* at 457.

[5] We note that many corporations are now obliged to break down their financial information by broad product category rather than publishing only data for the whole company. See Financial Accounting Standards Board, *Statement of Financial Accounting Standards No. 14, Financial Reporting for Segments of a Business Enterprise* (Dec. 1976).

[6] An administrative law judge may provide that such showings may be made *in camera* if the discussions themselves would be tantamount to revealing the allegedly injurious information at issue.

We note that there may be some uncertainty about our statement in *Bristol-Myers* concerning the elements of the "clearly defined, serious injury" that must be shown in order to warrant *in camera* treatment, and it seems appropriate to take this opportunity to clarify the *Bristol-Myers* test. We reaffirm here that the showing required to warrant *in camera* protection is the *Hood* standard, i.e., that public disclosure of the information in question will result in "clearly defined, serious injury." 58 F.T.C. at 1188. In *Bristol-Myers* we stated that such serious injury requires that the information in question is secret and material to the applicant's business and would be less likely to be produced if it were known that the information had to be publicly disclosed. 90 F.T.C. at 456. It is this latter, third prong of the *Bristol-Myers* standard that, we believe, raises troublesome problems of application.

In *Bristol-Myers*, the purpose of this third factor was to effect a balance between the need for a public record and the interest of businesses in avoiding disclosure of sensitive information. *Id.* It seems, however, that this balance can be struck without attempting to ascertain whether businesses will be less likely to produce and retain the kind of documents for which *in camera* treatment is sought if the contents of such documents are disclosed to competitors. Since many records that may be of value to competitors are essential to a firm's operations, it is unlikely that this consideration will adequately serve to differentiate which information should be granted *in camera* protection and which should not be so treated. In our view, if disclosure of confidential business information is likely to cause serious competitive injury, the principal countervailing consideration weighing in favor of disclosure should be the importance of the information in explaining the rationale of our decisions. It is unnecessary and not particularly helpful to require as an additional consideration an assessment of the likelihood that businesses will continue to produce that type of information even if disclosed. For these reasons, we hereby modify the *Bristol-Myers* standard by eliminating the third criterion of the test set forth in that decision.

In all other respects, we reaffirm the *Bristol-Myers* order. Thus, in determining future requests for *in camera* treatment, ALJs should require applicants to make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury. *Bristol-Myers* lists several particular factors that should be weighed by ALJs in determining whether the required showings of secrecy and materiality have been met. If there is doubt as to whether particular kinds of business records deserve *in camera* treatment, the ALJs may also find it useful to refer to recent court decisions dealing with the scope and subject matter of Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) ("FOIA"). *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974). Categories of business records that courts have judged to be exempt from mandatory disclosure under the FOIA may be suited to *in camera* treatment, although a final determination must, of course, be made on the adequacy of the applicant's showings in light of the "serious injury" standard set forth in *Bristol-Myers* and *Hood* where we noted that confidentiality is not itself sufficient to warrant *in camera* treatment. 58 F.T.C. at 1189. Conversely, court decisions holding that specific types of business records are *not* exempt from mandatory disclosure should help ALJ's to quickly identify records that are presumptively inappropriate for *in camera* protection.[7]

We reiterate that the *Hood/Bristol-Myers* standard best serves the overall public interest because it strikes the balance between the need for a public understanding of the Commission's adjudicative actions and the interest of business in avoiding competitive injury from public disclosure of information.

Accordingly, General Foods' motion is denied. This order is without prejudice to the administrative law judge's discretion to revise his order should General Foods make a more detailed showing or to consider the effect of our clarification of *Bristol-Myers*.

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[7] Recognizing that in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions.

IN THE MATTER OF

SHELL OIL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-3012. Complaint, March 12, 1980—Decision, March 12, 1980

This consent order requires, among other things, a Houston, Texas oil company to cease failing to terminate the liability of a credit card holder for any unauthorized use of the card, after being properly notified by the card holder that third-party use was no longer authorized.

Appearances

For the Commission: *Robert C. Cheek.*

For the respondent: *A.M. Minotti*, Houston, Texas.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth In Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Shell Oil Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth In Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS: For purposes of this complaint, the terms "card issuer," "cardholder," "consumer credit," "credit," "credit card," "creditor," "customer," and "unauthorized use" shall be defined as provided in Regulation Z, 12 CFR 226, the implementing regulation of the Truth In Lending Act, 15 U.S.C. 1601, *et seq.*, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Shell Plaza in the City of Houston, State of Texas.

PAR. 2. Respondent is now and for sometime has been engaged in the offering for sale and sale of gasoline and automotive products and services to the public at retail and to dealers.

PAR. 3. In the ordinary course and conduct of its business, respondent regularly extends or arranges for the extension of consumer credit and is a "creditor" as defined in Regulation Z.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course of its business, has issued credit cards to cardholders for their use both at service stations operated by respondent's employees and at certain service stations operated by independent businessmen that extend or arrange consumer credit for respondent. Such credit cards enable cardholders to purchase from such service stations automotive goods and services, such as gasoline, tires and automobile maintenance services, and to defer payment for such goods and services.

PAR. 5. Such payments are deferred by the cardholders' signing charge tickets specifying the amount of charges for the goods or services purchased. At a later date, respondent sends periodic billing statements to its cardholders listing the total charges received by respondent and processed for that billing period, after which time the cardholders are required to make payment for such charges.

PAR. 6. In various instances, certain cardholders authorize other persons (hereinafter referred to as "third persons") to use their credit cards to purchase goods and services. In such instances, respondent holds the cardholders liable for such authorized use even though the cardholders do not sign the charge tickets and even though the cardholders receive no benefit from such use.

PAR. 7. In certain instances, cardholders notified respondent that such previously authorized use had been revoked. In certain instances, respondent informed such cardholders that they were liable for such charges incurred by the third person until the credit cards used by the third persons were returned to respondent, and respondent requested payments from the cardholders for such third-person charges after notification by the cardholders to respondent of the revocation.

PAR. 8. By and through the acts and practices alleged above, respondent has failed to limit the liability of a cardholder for unauthorized use of each credit card issued in accordance with the requirements of §226.13(b)(2) of Regulation Z, and such failure constitutes a violation of §226.13(b)(2) of Regulation Z.

PAR. 9. Pursuant to §103(s) of the Truth In Lending Act, respondent's aforesaid failure to comply with Regulation Z constitutes a violation of that Act, and pursuant to §108 thereof respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Shell Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Shell Plaza, in the City of Houston, State of Texas.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, The respondent Shell Oil Company, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any offering to arrange, arrangement or extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 CFR 226) of the Truth In Lending Act (15 U.S.C. 1601, *et seq.*, as amended) do forthwith cease and desist from:

1. Failing to limit the liability of a cardholder for use of a credit

card by a third person, in those cases where such third person has been given authorization by the cardholder to use such credit card, to the amount of money, property, labor, or services obtained by use prior to notification to respondent, in accordance with Section 226.13(e) of Regulation Z, by the cardholder or the cardholder's agent that such use is no longer authorized, as required by Section 226.13(b)(2) of Regulation Z.

2. Informing a cardholder that respondent considers the cardholder liable for use of a credit card by a third person which occurs after the cardholder notifies respondent that such use is no longer authorized.

Provided, however, that it shall be a defense to any action brought hereunder for respondent to affirmatively show by a preponderance of the evidence that the alleged violation was due to a circumstance in which:

a) it attempts to hold a cardholder liable for use of its credit card when the cardholder has received the benefit from such use, or

b) it attempts to hold a cardholder liable for use of its credit card when the cardholder has engaged in fraudulent use of its credit card.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future supervisory personnel of respondent who are engaged in the furnishing of credit card information or in the billing or collecting of credit card accounts and that respondent secure a signed statement acknowledging receipt of said copy of this order from each such person.

It is further ordered, That respondent herein shall, within sixty (60) days and again within one (1) year after service of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

HAIR EXTENSION OF BEVERLY HILLS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3013. Complaint, March 13, 1980—Decision, March 13, 1980

This consent order requires, among other things, two California firms and two individuals engaged in the sale of hair replacement services to cease soliciting, selling or performing hair implants; and/or misrepresenting, in advertising or otherwise, the safety or effectiveness of the hair implant process in the treatment of baldness. Should respondents engage in any future hair replacement business, they must expend at least $8,000 on corrective advertising warning consumers that "Hair Implants Are Unsafe." The order also requires that the Commission notify past hair implant customers that the process is unsafe and that they should seek prompt medical attention.

Appearances

For the Commission: *George E. Schulman* and *Anne B. Roberts.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hair Extension of Beverly Hills, Inc., a corporation, also trading and doing business as Hair TransCenter; Hair Extension, Inc., a corporation, also trading and doing business as Hair TransCenter; Lee Marlow, individually and as an officer of said corporations; and Ann Marlow, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Hair Extension of Beverly Hills, Inc., also trading and doing business as Hair TransCenter, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is at 8383 Wilshire Boulevard, Beverly Hills, California.

Respondent Hair Extension, Inc., also trading and doing business as Hair TransCenter, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is at 16152 Beach Boulevard, Huntington Beach, California.

Respondent Lee Marlow is an officer of each of the corporate respondents named herein. He formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His address is 16152 Beach Boulevard, Huntington Beach, California.

Respondent Ann Marlow is an officer of each of the corporate respondents named herein. She formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. Her address is 16152 Beach Boulevard, Huntington Beach, California. She is the wife of Lee Marlow.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale and sale to the general public of hair replacement products, processes, operations and surgical procedures, for the treatment of baldness, thinning hair or loss of hair, or for the replacement of lost hair, including a process or operation which is known as a "hair implant" or "dermis inversion" process ("the Hair Implant Process").

For the purpose of this complaint, the Hair Implant Process is defined as a hair replacement product, process, operation or surgical procedure which involves the insertion or placement of (1) synthetic fibers or filaments which simulate hair or (2) non-living human hairs, into or under the scalp of the patient.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two are incorporated by reference herein as if fully set forth verbatim.

PAR. 3. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said businesses, respondents are now making, and have made representations, orally and in writing, directly and indirectly, in commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, the purchase of the Hair Implant Process in commerce.

PAR. 5. Respondents represent, orally and in writing, directly and indirectly, that the Hair Implant Process in general is safe and effective, and that the Hair Implant Process as performed by respondents or by their agents, representatives or employees is safe and effective for providing the purchaser with a natural looking head of hair, or for treating baldness, thinning hair or loss of hair, or for replacing lost hair, and will not result in medical complications or infections.

PAR. 6. In truth and in fact, the Hair Implant Process is not generally recognized as safe and effective, and is not performed in a safe and effective manner by respondents. The Hair Implant Process, both in general and as performed by respondents, does not result in a natural looking head of hair, and is not an effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair. The Hair Implant Process, both in general and as performed by respondents, results in medical complications and infections which may endanger the health of the purchaser.

Therefore, the representations set forth in Paragraph Five were and are false, misleading, deceptive and unfair.

PAR. 7. There existed, at all times relevant hereto, no reasonable basis for making the representations set forth in Paragraph Five herein.

Therefore, the making of the representations as set forth in Paragraph Five herein, without a reasonable basis constituted and now constitutes unfair or deceptive acts or practices.

PAR. 8. Respondents fail to disclose, either orally or in writing, directly or indirectly, that the Hair Implant Process, in general and as performed by respondents, is not a safe or effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair, and presents a high risk of infection or other medical complications which may endanger the health of the purchaser.

PAR. 9. In truth and in fact, the Hair Implant Process, both in general and as performed by respondents, is not generally recognized as a safe or effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair and presents a high risk of infection or other medical complications which may endanger the health of the purchaser.

Therefore, the failure to disclose that the Hair Implant Process is not a safe or effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair, and the failure to disclose that it presents a high risk of infection or other medical complications which may endanger the health of the purchaser, constitutes unfair or deceptive acts or practices.

COUNT II

Alleging violation of Section 12 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two are incorporated by reference herein as if fully set forth verbatim.

PAR. 10. In the course and conduct of their said businesses, respondents have disseminated and caused the dissemination of certain advertisements concerning the Hair Implant Process through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations, and advertisements in the form of a brochure entitled "Hair TransCenter" which was, and is, sent through the United States mail, for the purpose of inducing, and which is likely to induce, the purchase of respondents' Hair Implant Process, and have disseminated and caused the dissemination of advertisements concerning said Hair Implant Process by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said Hair Implant Process in commerce.

PAR. 11. Respondents represent directly and indirectly, in said advertisements, disseminated as previously described, but not necessarily inclusive thereof, that the Hair Implant Process is a safe and effective method for providing the patient with a natural looking head of hair, or for treating baldness, thinning hair or loss of hair, or for replacing lost hair, and that the Hair Implant Process is approved by doctors, and will not result in medical complications or cause infections.

PAR. 12. In truth and in fact, the Hair Implant Process, both in general and as performed by respondents, is not a safe or effective method for the treatment of baldness, thinning hair or loss of hair, or for the replacement of lost hair. The Hair Implant Process presents a high risk of severe infections or other medical complications which may endanger the health of the purchaser. The Hair Implant Process is not an effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair, because the implanted hairs fall out or break off shortly after inserted. In addition, due to the Hair Implant Process, frequently a patient loses his own hair. The Hair Implant Process is not approved by doctors relying on competent and reliable scientific evidence, and in fact, generally is recognized by doctors as an unsafe and ineffective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair.

Therefore, the advertisements referred to in Paragraphs Ten and

Eleven, were and are misleading in material respects and constituted, and now constitute, false advertisements.

PAR. 13. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products and services of the same general kind and nature as the products and services sold by respondents.

PAR. 14. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 15. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint and waivers and other provisions as required by the Commission's Rules; and

The respondents agreed to provide to the Commission the names and addresses of their customers who underwent or paid money to undergo the Hair Implant Process and that the Commission may notify each said customer regarding the risks and problems involved in the Hair Implant Process and the fact that this order has been accepted by the Commission, such notice being substantially similar to the following letter:

Dear ____________________

Hair Extension told us that you came to their office for hair implants. The FTC has reason to believe that the hair implant process is not safe or effective at the present time. There is no medically safe way to do hair implants. Therefore, many of their customers have developed scalp infections.

Hair Extension has promised the Federal Trade Commission that they will not do any more hair implants until the Food and Drug Administration approves a safe and effective procedure that protects future customers. However, we thought we should contact former customers to let them know the problems they could have with their implants.

Some people get infections right away. For others, an infection may develop months later. A few may never have a problem.

Many people report severe symptoms—pain, noticeable scarring, hairs breaking off, scalp soreness, redness and swelling. However, others may have only a minor problem. A problem may not be too noticeable now but could develop into a more serious problem if not treated.

Therefore, for your own safety, you may want to see a doctor for an examination of your scalp and implants. If you do have any of these symptoms, you should go see a doctor immediately. The agreement which Hair Extension signed does not provide refunds or money for your doctor bills. However, you might want to contact an attorney to find out whether Hair Extension may be liable for any costs or injury you have suffered.

and, the Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further comformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent Hair Extension of Beverly Hills, Inc., also trading and doing business as Hair TransCenter, is a corporation organized, existing and doing business under and by virtue of the laws

of the State of California. Its principal office and place of business is at 8383 Wilshire Boulevard, Beverly Hills, California.

Proposed respondent Hair Extension, Inc., also trading and doing business as Hair TransCenter, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is at 16152 Beach Boulevard, Huntington Beach, California.

Proposed respondents Lee Marlow and Ann Marlow are officers, directors and stockholders of said corporations. They formulate, direct and control the policies, acts and practices of said corporations and their address is 16152 Beach Boulevard, Huntington Beach, California. They are husband and wife.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definition shall apply:

The "Hair Implant Process" refers to any hair replacement product, process, operation or surgical procedure which involves the insertion or placement of (1) synthetic fibers or filaments which simulate hair or (2) non-living human hairs, into or under the scalp of a patient.

I

It is ordered, That Hair Extension of Beverly Hills, Inc., Hair Extension, Inc., corporations, and Lee Marlow and Ann Marlow, individuals, their successors and assigns, their officers, agents, representatives, employees and persons under respondents' control, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale and sale of the Hair Implant Process, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Disseminating, or causing or permitting the dissemination of any advertisement or other representation or claim, express or implied, that the Hair Implant Process is safe or effective in the treatment of baldness, thinning hair or loss of hair, or for the replacement of lost hair.

2. Soliciting, recommending, promoting, offering for sale, selling, arranging for or performing the Hair Implant Process.

Provided, however, that nothing shall prevent respondents from filing with the Commission a petition to modify this order, *provided* that respondents are able to demonstrate to the satisfaction of the Commission by competent and reliable scientific tests that:

1. The Hair Implant Process is safe and effective (and affirmative approval by the Food and Drug Administration that the process is safe and effective shall be deemed sufficient proof of compliance with this provision), and

2. The Hair Implant Process will be performed by respondents (or by persons recommended by or under the control of respondents) in a safe and effective manner (and affirmative approval by the Food and Drug Administration that named respondents will perform the Hair Implant Process in a safe and effective manner shall be deemed sufficient proof of compliance with this provision.)

Provided, however, that if the Commission determines, upon proper application of respondents, that the Hair Implant Process is safe and effective and that the Hair Implant Process will be performed by respondents (or by persons recommended by or under the control of respondents) in a safe and effective manner, and such determination shall be based upon respondents' proof of compliance with the provisions set forth in the preceding paragraph, and if the Commission determines that further relief is necessary in the public interest, the Commission may require respondents to provide further relief. Said further relief may include, but is not limited to: (1) affirmative disclosures that there is a high probability of discomfort and pain and a high risk of infection, skin disease and scarring; that continuing special care is necessary to minimize the probabilities and risks referred to herein; and that such care may involve additional costs for medications and assistance; (2) a cooling-off period, following execution of contracts for services; and (3) a recommended consultation with an independent duly-licensed physician before undergoing the Hair Implant Process.

II

It is further ordered, That if Hair Extension of Beverly Hills, Inc., Hair Extension, Inc., corporations and Lee Marlow and Ann Marlow, individuals, their successors and assigns, their officers, agents, representatives, employees and persons under respondents' control, directly or through any corporation, subsidiary, division or other device, are engaged in or affilated with any business which offers methods of treating baldness, loss of hair or thinning hair, or the replacement of lost hair, and if such business advertises in any media during a one year period commencing thirty (30) days after this order becomes final, then respondents shall disclose in such advertising during that one year period, clearly and conspicuously, in type no smaller than the smallest type otherwise in the advertising or 10 point type, whichever is larger, the following notice:

WARNING

Hair implants, using artificial hair or human hair, are medically unsafe. We do not use this procedure.

III

It is further ordered, That if Hair Extension of Beverly Hills, Inc., Hair Extension, Inc., corporations, and Lee Marlow and Ann Marlow, individuals, their successors and assigns, their officers, agents, representatives, employees and persons under respondents' control, directly or through any corporation, subsidiary, division or other device, are engaged in any business which offers methods of treating baldness, loss of hair or thinning hair, or the replacement of lost hair, respondents shall place the following advertisement in the *Los Angeles Times*, the *Santa Ana Register*, the *Los Angeles Herald Examiner* and *Los Angeles Magazine*.

HAIR IMPLANTS ARE UNSAFE

Hair implants, the inserting of synthetic hairs or human hairs into the scalp, are medically unsafe.

Many hair implant patients have developed scalp infections, noticeable scarring *and* have lost the implanted hair.

The *Federal Trade Commission* advises anyone considering a hair implant—or any other "cure" for baldness—to see a doctor. If you had a hair implant and have developed any problems, you should go see a doctor immediately.

This notice was prepared by the FTC and placed at the expense of Hair Extension, Inc., as part of a recent consent agreement between it and the FTC.

Federal Trade Commission
Los Angeles Regional Office

A. The placement of the advertisement in the newspapers shall be as follows:

1. Said advertisements shall appear at least once per month in each and every newspaper and magazine identified above, for six consecutive months commencing thirty (30) days after the date this order becomes final.

2. Said advertisement shall appear in the Sunday edition of each above-identified newspaper.

3. Respondents shall request placement of the advertisements in the Sports section of each newspaper.

B. The size of the advertisement shall be as follows:

1. The advertisement to be placed in the *Los Angeles Magazine* shall be equal to or larger than one column in width and the full length of the page.

2. The advertisement to be placed in the *Los Angeles Times*, *Santa Ana Register* and *Herald Examiner* shall be equal to or larger than two columns in width and four inches in length.

C. Respondents shall endeavor to obtain bulk rates for placing said advertisements at the lowest possible rates. Respondents shall spend no less than $8,000.00 for placing the advertisement required by this section.

D. The format, type size and type face of the advertisement shall be subject to the approval by the Commission or its representative prior to its use by respondents.

IV

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, voluntary bankruptcy, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That for a period of five (5) years from the effective date of this order, each individual respondent shall promptly notify the Commission of the discontinuance of his/her present business or employment and of his/her affiliation with a new business or employment which is engaged, during the time of such employment or affiliation, in methods of treating baldness, thinning hair, loss of hair or of the replacement of lost hair. Such notice shall contain respondent's current business address, a statement of the nature of the business or employment in which the respondent is newly engaged and a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, and within thirty (30) days after termination of the advertising required by Section III of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MID CITY CHEVROLET, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3014. Complaint, March 17, 1980—Decision, March 17, 1980

This consent order requires, among other things, a Laurel, Md. motor vehicle dealer and its corporate officer to cease, in connection with the advertising and sale of an automobile retrofit device known as the Power Pak, making false or unsubstantiated fuel economy claims and misrepresenting the purpose, content or conclusion of tests and surveys. Advertisements referring to fuel economy improvement resulting from the installation of an automobile retrofit device must include a disclaimer and at least one fuel economy claim expressed in miles per gallon. Further, respondents are required to send to each consumer who had purchased a Power Pak from them a letter offering a full refund of the purchase and removal of the device at no charge. All refund requests must be honored in a timely manner and relevant records maintained for a period of three years.

Appearances

For the Commission: *Laurence M. Kahn.*

For the respondents: *Lynne Perkins-Brown,* Oxon Hill, Md.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mid City Chevrolet, Inc., a corporation and John Tyler, individually and as an officer of the corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Mid City Chevrolet, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 501 Washington Boulevard, Laurel, Maryland.

Respondent John Tyler is president of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Par. 2. Respondents, in conjunction with their business of selling cars, trucks, and vans, are now, and for some time last past have been, engaged in purchasing, offering for sale, sale, distribution, and advertising of a product known as Power Pak (hereinafter "product"), which product is advertised to be a means of improving fuel economy in automobiles. Said product is an automobile retrofit device, as "automobile retrofit device" is defined in §301 of the Energy Policy and Conservation Act of 1975 15 U.S.C. 2011. Respondents, in connection with their offering for sale of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said product, as well as for the purpose of promoting the sale of respondents' cars, trucks, and vans.

Par. 3. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 4. In the course and conduct of their said business, respondents have disseminated and caused the dissemination of certain advertisements for said product by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in newspapers with national circulations and the transmission of advertisements through radio stations with sufficient power to broadcast across state lines and into the District of Columbia for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

Par. 5. Among the advertisements and other sales promotional materials is the material identified as Exhibit A which is attached hereto.

Par. 6. Through the use of advertisements referred to in Paragraph Five and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. the Power Pak when installed in a typical automobile will significantly improve fuel economy;

b. under normal driving conditions, a typical driver will ordinarily obtain a fuel economy improvement of 25% to 50% when Power Pak is installed in his/her automobile;

c. competent scientific tests prove the fuel economy claims made for Power Pak.

Par. 7. At the time respondents made the representations alleged in

Paragraph Six of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 8. In truth and in fact, contrary to respondents' representations in Paragraph Six:

a. Power Pak when installed in a typical automobile will not significantly improve fuel economy;

b. under normal driving conditions, a typical driver will not ordinarily obtain a fuel economy improvement of 25% to 50% when Power Pak is installed in his/her automobile;

c. no competent scientific tests prove the fuel economy claims made for Power Pak.

Therefore, said advertisements are deceptive, misleading or unfair.

PAR. 9. Exhibit A and other advertisements represent, directly and by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Six. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of automobile retrofit devices and in the sale of cars, trucks, and vans.

PAR. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

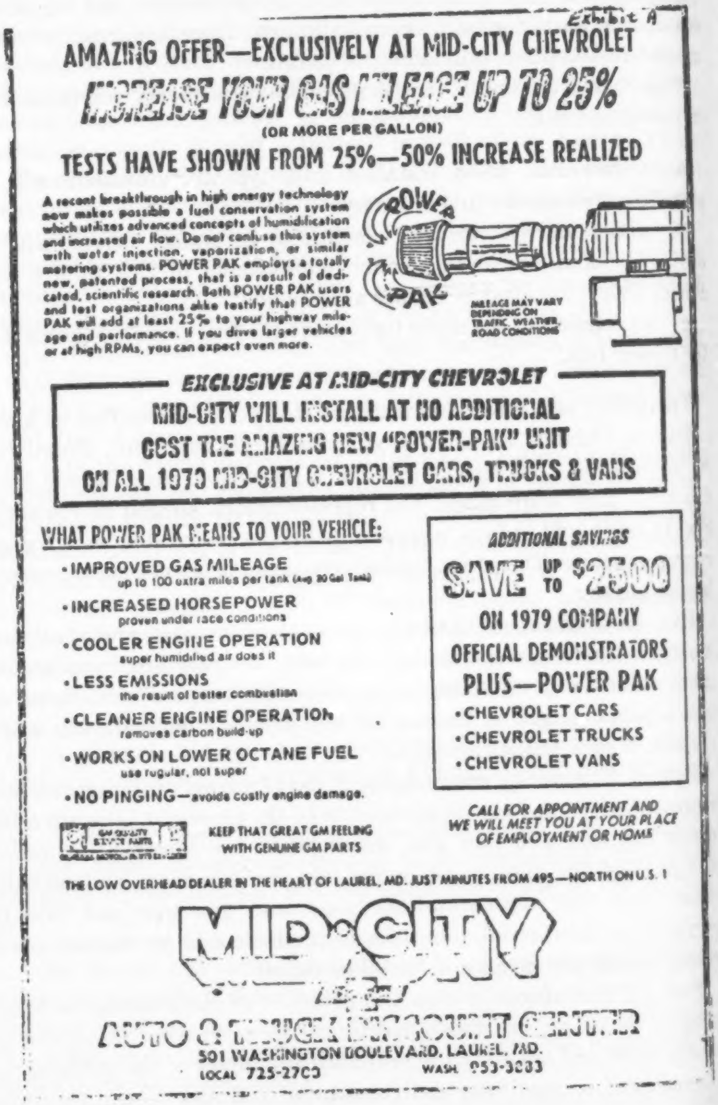

Exhibit A

AMAZING OFFER—EXCLUSIVELY AT MID-CITY CHEVROLET

INCREASE YOUR GAS MILEAGE UP TO 25%

(OR MORE PER GALLON)

TESTS HAVE SHOWN FROM 25%—50% INCREASE REALIZED

A recent breakthrough in high energy technology now makes possible a fuel conservation system which utilizes advanced concepts of humidification and increased air flow. Do not confuse this system with water injection, vaporization, or similar metering systems. POWER PAK employs a totally new, patented process, that is a result of dedicated, scientific research. Both POWER PAK users and test organizations alike testify that POWER PAK will add at least 25% to your highway mileage and performance. If you drive larger vehicles or at high RPMs, you can expect even more.

MILEAGE MAY VARY
DEPENDING ON
TRAFFIC, WEATHER,
ROAD CONDITIONS

EXCLUSIVE AT MID-CITY CHEVROLET

MID-CITY WILL INSTALL AT NO ADDITIONAL
COST THE AMAZING NEW "POWER-PAK" UNIT
ON ALL 1979 MID-CITY CHEVROLET CARS, TRUCKS & VANS

WHAT POWER PAK MEANS TO YOUR VEHICLE:

- IMPROVED GAS MILEAGE
  up to 100 extra miles per tank (avg 20 Gal Tank)
- INCREASED HORSEPOWER
  proven under race conditions
- COOLER ENGINE OPERATION
  super humidified air does it
- LESS EMISSIONS
  the result of better combustion
- CLEANER ENGINE OPERATION
  removes carbon build-up
- WORKS ON LOWER OCTANE FUEL
  use regular, not super
- NO PINGING—avoids costly engine damage.

ADDITIONAL SAVINGS

SAVE UP TO $2500

ON 1979 COMPANY
OFFICIAL DEMONSTRATORS
PLUS—POWER PAK

- CHEVROLET CARS
- CHEVROLET TRUCKS
- CHEVROLET VANS

CALL FOR APPOINTMENT AND
WE WILL MEET YOU AT YOUR PLACE
OF EMPLOYMENT OR HOME

GM QUALITY SERVICE PARTS

KEEP THAT GREAT GM FEELING
WITH GENUINE GM PARTS

THE LOW OVERHEAD DEALER IN THE HEART OF LAUREL, MD. JUST MINUTES FROM 495—NORTH ON U.S. 1

MID-CITY

AUTO & TRUCK DISCOUNT CENTER

501 WASHINGTON BOULEVARD, LAUREL, MD.
LOCAL 725-2700 WASH. 953-3033

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in the further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mid City Chevrolet, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business at 501 Washington Boulevard, Laurel, Maryland. Respondent John Tyler is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

PART I

It is ordered, That respondents Mid City Chevrolet, Inc., a corporation and John Tyler, individually and as an officer of the corporation, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the automobile retrofit device known as Power Pak, as "automobile retrofit device" is defined in §301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the automobile retrofit device known as Power Pak will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle without otherwise adjusting parameters on the vehicle's engine to conditions other than those specified by the vehicle's manufacturer.

PART II

It is further ordered, That respondents, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device as "automobile retrofit device" is defined in §301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless (1) such representation is true, and (2) at the time of making such representation, respondents possess and rely upon written results of dynamometer testing of such device according to the then current urban and highway driving test cycles established by the Environmental Protection Agency and these results substantiate such representation and (3) where the representation of the fuel economy improvement is expressed in miles per gallon or percentage, all advertising and other sales promotional materials, which contain the representation expressed in such a way, must also contain, in a way that clearly and conspicuously discloses it, the following disclaimer: "REMINDER: Your actual fuel saving may be less. It depends on the kind of driving you do, how you drive and the condition of your car;"

b. misrepresenting in any manner the purpose, content, or conclusion of any test or survey pertaining to such device;

c. failing to disclose clearly and conspicuously in any advertisement or other promotional material that refers or relates in any way to such device the fuel economy improvement, if any, in miles per gallon which may be expected from the installation of such device on motor vehicles.

PART III

1. Respondents, within thirty (30) days of the date on which this order becomes final, shall send a copy of the letter marked Exhibit B via first class mail to each consumer who purchased from them the device known as Power Pak and whom respondents are able to locate from information in their files. Respondents, upon receiving, within one year of the date upon which this order becomes final, either a written or a verbal request for a refund of Power Pak's purchase price from any consumer who purchased Power Pak from them, shall, within one week of the date of such request: 1) refund the full purchase price of Power Pak, including any installation charges and taxes, and 2) remove Power Pak from the consumer's vehicle at no charge to the consumer, and 3) at no charge to the consumer, make any adjustments to the vehicle's engine which are made necessary by Power Pak's removal. The envelopes in which Exhibit B is enclosed shall contain no restrictions against forwarding and shall be plain white envelopes with no marking other than Mid City Chevrolet's name and return address and the name and address of the consumer purchaser.

2. Respondents shall supply, as part of their initial compliance report, noted in Part VIII below, a list consisting of the name and address of each and every person whom respondents were able to locate from information in their files, and a list consisting of the name and address of each and every person to whom Exhibit B was sent. Respondents shall supply as part of their supplemental compliance report, noted in Part VIII below, a list consisting of the name and address of each and every person requesting a refund and the date of that person's request, and a list consisting of the name and address of each and every person to whom refund was made, the dollar amount of that person's refund, and the date upon which that person received the refund. Each such list shall contain the names of individuals in alphabetical order.

PART IV

It is further ordered, That respondents, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device, as "automobile retrofit device" is defined in §301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; records of the number of pieces of direct mail advertising sent in each direct mail advertisement dissemination; documents which substantiate or tend to substantiate or which contradict or tend to contradict any claim, made directly or by implication, concerning such device, which is a part of the advertising, sales promotional material, or post-purchase materials disseminated by respondents directly or through any business entity; documents indicating the names and addresses of all persons requesting refunds; documents indicating the names and addresses of all persons receiving refunds; documents indicating, for each person receiving a refund, the amount that person received. Such records shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional, or post-purchase materials were disseminated.

PART V

It is further ordered, That the corporate respondent shall forthwith
distribute a copy of this order to each of its operating divisions, to it
successors and assigns, and to each of its officers, agents, representa
tives, or employees who are engaged in the preparation and placemen
of advertisements, and that the individual respondent shall forthwit
distribute a copy of this order to each of his agents, representatives
employees, successors and assigns.

PART VI

It is further ordered, That respondents notify the Commission
least thirty (30) days prior to the effective date of any proposed chang
in the corporate respondent such as dissolution, assignment, or sal
resulting in the emergence of a successor corporation, the creation
dissolution of subsidiaries or any other change in the corporation whi
may affect compliance obligations arising out of the order.

PART VII

It is further ordered, That the individual respondent named here promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's position in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

PART VIII

It is further ordered, That the respondents shall within sixty (60) days after service upon them of this order, and also one (1) year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they complied with this order.

EXHIBIT B

(date letter sent by Mid City
inserted here)

Mid City Chevrolet
501 Washington Boulevard
Laurel, Maryland 20810
(301) 725-2700
(202) 953-3883

REFUND OFFER

Dear Customer:

Some time ago you bought a device called Power Pak from us. Our ads claimed your car would use far less gas with it, but we have since become aware that we did not have adequate grounds for making this claim, and Power Pak may well not give you the gas mileage improvement you expected, if any at all. Therefore, if you are not satisfied with the results you have received from Power Pak, we are offering you a full refund of the price you paid. At no charge, we will also remove Power Pak from your car and will perform any adjustments to your engine made necessary by its removal.

To get the refund, please call or write us or just stop in and ask for a refund. If we can't remove Power Pak right then, we will remove it and refund your money within one week of the date we hear from you. This offer expires (date one year after date order becomes final inserted here) so don't delay.

Sincerely,

Mid City Chevrolet

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, March 18, 1980

ORDER DENYING MOTION TO STAY APPEAL

Respondent American Home Products (AHP) has filed a motion requesting the Commission to stay AHP's appeal pending its consolidation with other cases involving advertising claims for analgesic products,[1] or, in the alternative, to stay consideration of a motion filed by Sterling Drug Inc. in one of the other cases (Dkt. 8919).[2] For the reasons stated below, AHP's motion for a stay is denied.

One of the grounds asserted by AHP as a basis for its motion is that Commission consideration of Sterling's proposed consent order in Dkt. 8919 would "prejudge" AHP's appeal in this proceeding. AHP contends that this prejudgment would occur because the proposed consent order in Dkt. 8919 contains provisions applicable to Sterling's over-the-counter combination analgesics which are very similar to provisions contained in the order entered by the Administrative Law Judge against AHP in this proceeding. AHP's contention that Commission consideration or disposition of a proposed consent order in another, factually-related proceeding would somehow disqualify the Commission from deciding this appeal is without merit, and AHP has cited no precedent for it. A tribunal which in the context of a prior proceeding has passed on factual issues is not precluded from passing upon identical issues in a subsequent adjudication even when the two proceedings derive from the same set of facts. See, *e.g., Pangburn* v. *CAB*, 311 F.2d 349, 358 (1st Cir. 1962). Here, by contrast, Commission consideration of a proposed consent order in Docket No. 8919 requires no determination on the facts at issue in that proceeding; in addition, the two proceedings derive from distinct, albeit overlapping, sets of facts. Moreover, if AHP's position were correct, the Commission might be prevented from giving any consideration to the other pending analgesics cases, a result which would frustrate the exercise of the Commission's adjudicative function. Cf. *FTC* v. *Cement Institute*, 333 U.S. 683, 700–01 (1948).

AHP argues in addition that its appeal should be stayed pending its consolidation with any appeals from *Sterling Drug* and *Bristol-Myers* because of the "risk of unfairness inherent in deciding the pending analgesics cases on a piecemeal basis." This appears to be essentially the same concern about the potential competitive impact of an order against AHP which it has expressed before and which we have found to be premature. As we indicated in our orders dated November 3, 1978 denying an earlier motion to stay, and November 8, 1979 denying a motion for reopening of proceedings, the Commission is capable of considering, during the course of its review on appeal, the possible competitive impact of any order that it might enter if liability is found. We see no need to stay our consideration of this appeal.[3]

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[1] *Sterling Drug, Inc.*, Dkt. 8919; *Bristol-Myers Co.*, Dkt. 8917.

[2] Sterling's motion sought to withdraw from adjudication all issues relating to Sterling's over-the-counter combination internal analgesics and to enter a cease and desist order applicable to these products.

AHP's alternative request to stay consideration of the motion filed by Sterling Drug in Dkt. 8919 to withdraw certain issues from adjudication is not properly raised in this proceeding. If there were any reason to provide relief to AHP for the concerns it raises—and we have explained above that our view is to the contrary—such relief would be an order affecting the instant proceeding and not a separate proceeding to which AHP is not a party. Accordingly,

It is ordered, That the Motion of American Home Products Corporation for Stay of this Proceeding Pending Consolidation of all Three Pending Analgesics Cases on Appeal be, and the same hereby is, denied.

Commissioner Pitofsky did not participate.

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[3] If the Commission were to find liability, and if it were to enter an order with terms giving rise to a new question upon which respondent had no opportunity to argue earlier, AHP would have an opportunity to petition for reconsideration under Rule 3.55, 16 C.F.R. 3.55. Under that provision, the Commission may stay the effective date of its order.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, March 28, 1980

ORDER REMANDING MOTION FOR COURT ENFORCEMENT OF SUBPOENA

The administrative law judge has certified to the Commission a motion by General Foods for court enforcement of a subpoena *duces tecum* issued jointly to Jorge Wolney Atalla, as Chairman of the Board of Hills Bros. Coffee, Inc., and to Copersucar, c/o Jorge Wolney Atalla. The administrative law judge recommends that court enforcement be limited to Specifications 4 and 5, since he believes the other specifications are either duplicative or call for nonessential material. In brief, Specifications 4 and 5 request documents concerning the reasons for Copersucar's acquisition of Hills Bros. and the changes made in Hill Bros.' operations by Mr. Atalla or Copersucar.

Copersucar and Hills Bros. have raised two issues concerning the enforceability of this subpoena. First, Copersucar contends that, insofar as the subpoena seeks documents located in Brazil, it exceeds the Commission's statutory authority under Section 9 of the Federal Trade Commission Act, which provides that "the production of . . . documentary evidence may be required from any place in the United States." Copersucar's interpretation notwithstanding, Section 9 authorizes the Commission to subpoena documents located abroad, as well as documents located anywhere within the United States. *FTC* v. *Compagnie de Saint-Gobain-Pont-A-Mousson*, Misc. No. 78-0194 (D.D.C., filed Feb. 14, 1980); *cf. CAB* v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951 (D.C. Cir. 1979); *FMC* v. *DeSmedt*, 336 F.2d 464 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966). Thus, nothing in Section 9 would preclude enforcement of the subpoena.

Second, Hills Bros., acting on Mr. Atalla's behalf, has objected that the subpoena was not served in compliance with Rule 4.4(a)(1)(i) of the Commission's Rules of Practice, which require that service by mail of complaints, orders and other process under Section 5 be made to a person or corporation at his, her, or its residence or "principal office or place of business." The ALJ has read the rule to authorize service either at the principal office or *any* place of business of the party to be served. Hills Bros. contends that the word "principal" qualifies both "office" and "place of business," and that Hills Bros.' headquarters do not constitute Copersucar's or Mr. Atalla's principal place of business. We agree with Hills Bros.' interpretation of the rule.[1] This conclusion

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[1] Rule 4.4(a)(1)(i) is derived from Section 5(f) of the Federal Trade Commission Act. While we have found no cases directly on point and the legislative history is silent, there are persuasive grounds to infer that our interpretation of

(Continued)

best copy available

does not settle the question of service, however, since it might also be argued (1) that Rule 4.4(a)(1)(i) is satisfied by service on a foreign corporation's principal place of business in the United States, and that Hills Bros. constitutes Copersucar's principal place of business in the United States; or (2) that the more lenient provisions of Rule 4.4(a)(2) govern service in this instance.

We do not reach these issues, which have not been fully briefed by the parties, because we find it necessary to remand the matter to the ALJ for further proceedings on the more basic issue of personal jurisdiction. While the Commission's subpoena authority may reach beyond the borders of the United States, it is not without limits. At a minimum, the enforceability of Commission subpoenas is circumscribed by the authority of an enforcement court, under Section 9, to exercise personal jurisdiction over the subpoena recipient. It would be a hollow gesture for us to authorize enforcement of a subpoena without even a threshold showing that the subpoenaed party is likely to be amenable to the jurisdiction of the enforcement court. Moreover, the fact that the assertion of enforcement jurisdiction over companies and documents located abroad may affect the interests and policies of foreign governments and raise questions of international comity warrants at least a threshold jurisdictional inquiry.

The information we have been given here is too sketchy to inspire confidence that even a colorable claim of jurisdiction over Copersucar can be maintained. The company is located in Brazil and purports to have no holdings in the United States other than Hills Bros. It is true that Hills Bros. is wholly owned by Copersucar and that Mr. Atalla, evidently one of Copersucar's principal investors, is the Chairman of the Board of Hills Bros. However, we are also told that, according to a "formal interview," Hills Bros. is "fairly autonomous" of Copersucar and that Mr. Atalla comes to San Francisco but once a year, staying only briefly before returning home to Brazil. These few facts are insufficient by themselves to warrant the assertion of enforcement jurisdiction over Copersucar where, as here, it is neither the target of a Commission investigation, nor charged with a violation of Section 5 of the Federal Trade Commission Act or any other statute administered by the Commission.

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the language in the rule and statute is in accord with congressional intent. The terms "principal office" and "principal place of business" are used commonly in corporation codes, bankruptcy laws, and jurisdictional statutes. However, in some contexts, what qualifies as a principal office may not necessarily be a principal place of business. *See 1 Moore's Federal Practice*, §0.77[.2-1]. It thus seems reasonable to assume that Congress combined the two formulations in Section 5(f) to ensure that service would be upheld regardless of the category into which the place of delivery was deemed to fall. This interpretation ensures both that service is proper and that process is delivered to responsible employees of the business concerned. If, on the other hand, the ALJ's interpretation were to be accepted, service would be upheld when made at any place of business, no matter how ill-equipped it might be to process a subpoena or transmit it quickly to appropriate company officials.

Since the jurisdictional issue was not squarely presented below, we remand to the ALJ for further proceedings on this question. As the party that seeks documents from Copersucar, General Foods will have the burden of establishing a reasonable basis for the Commission to invoke the exercise of a district court's enforcement jurisdiction. In cases involving nonresident corporations, the appropriate test is whether the party concerned has sufficient contacts with the forum that the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940); *Honeywell, Inc.* v. *Metz Apparatewerke*, 509 F.2d 1137, 1143–44 (7th Cir. 1975); *see also Restatement (Second) of Conflict of Laws* §§10, 50, 52 (1969). General Foods may be able to demonstrate that personal jurisdiction over Copersucar is reasonable because that company is, in effect, itself doing business in this country through its operation and control of Hills Bros. *See, e.g., SCM Corp.* v. *Brother Int'l Corp.*, 316 F.Supp. 1328 (S.D.N.Y. 1970); *Flank Oil Co.* v. *Continental Oil Co.*, 277 F.Supp. 357 (D. Colo. 1957); *S.M. Stein Enterprises* v. *Irish Int'l Air Lines*, 236 F.Supp. 71 (1964). Even if there are insufficient grounds for establishing jurisdiction on that basis, the exercise of jurisdiction over Copersucar may still be reasonable in view of all of that company's contacts with interstate commerce and its relationship to the case at hand. *Cryomedics, Inc.* v. *Spembly, Ltd.*, 397 F.Supp. 287 (D.Conn. 1975); *SCM Corp., supra; see also Kulko* v. *Superior Court*, 436 U.S. 84 (1978); *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

In outlining how General Foods might meet its burden of justifying the exercise of enforcement jurisdiction, we do not suggest that the issue can be resolved through application of one or two mechanical tests. Unfortunately, there are no hard and fast rules for determining when a foreign corporation's contacts with a forum are such that it may reasonably fall under that forum's jurisdiction; decisions in this area can be made only on the relevant facts of each particular case. Moreover, the problem of determining jurisdiction is especially difficult in this instance because Copersucar is not a respondent in the administrative proceeding, but is merely a party from whom General Foods seeks discovery. Accordingly, we suggest that the ALJ invite Hills Bros., Copersucar, and the parties to the proceeding to brief the relevant criteria that should be considered in determining whether jurisdiction may be exercised over Copersucar.

Given the intricacy of the jurisdictional issue, it warrants noting that the subpoena at issue here appears to have been properly served on Hills Bros., since it was addressed to Mr. Atalla as Hills Bros.' Chairman of the Board. *See FTC* v. *Anderson*, 442 F.Supp. 1118 (D.D.C.

1977), *aff'd.* CCH 1979-2 Trade Cas. ¶62837 (D.C.Cir. 1979). General Foods may therefore be entitled to production of whatever documents Hills Bros. has in its possession that respond to Specifications 4 and 5 of the subpoena. As the ALJ noted in his circulation, it seems likely that Hills Bros. will have responsive documents in its San Francisco office; if so, they may provide sufficient information to meet the needs of General Foods in this case. We will not order that court enforcement be sought against Hills Bros. at this time, however, because General Foods has apparently failed to request such action. Nevertheless, enforcement would seem to be appropriate if the ALJ certifies such a motion to us in the future. Accordingly,

It is ordered, That General Foods' motion that the Commission seek court enforcement of the subpoena *duces tecum* issued to Jorge Wolney Atalla and Copersucar be, and hereby is, remanded to the administrative law judge for proceedings to determine whether there is a reasonable basis for the Commission to invoke an enforcement court's jurisdiction over Copersucar.

IN THE MATTER OF

S. KLEIN, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-3015. Complaint, April 4, 1980—Decision, April 4, 1980

This consent order requires, among other things, a Washington, D.C. retailer of consumer goods to cease entering into layaway agreements which fail to clearly and conspicuously advise customers of their right to revoke transactions and receive refunds of money paid toward the cost of their purchases. Additionally, the order requires the firm to honor cancellations; furnish credit customers with cost disclosures required by Federal Reserve Systems regulations; and refund to eligible customers all monies known to have been forfeited under layaway transactions since August 1, 1975.

Appearances

For the Commission: *Bernard Rowitz* and *Irvin E. Abrams.*

For the respondent: *Joel P. Bennet* and *Jacob A. Stein,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Truth In Lending Act, as amended, and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that S. Klein, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth In Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent S. Klein, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1227 F St., N.W., Washington, D.C.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of women's ready-to-wear clothing and accessories and other consumer goods and products to the general public at retail.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, as amended, the allegations of Paragraphs One and Two, hereof, are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the ordinary course and conduct of its business, as aforesaid, respondent offers to sell and distribute merchandise in commerce by operating a number of retail clothing stores located in the District of Columbia and the Commonwealth of Virginia, and by causing merchandise to be shipped from its various suppliers to its clothing stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in merchandise and services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the ordinary course and conduct of its business, as aforesaid, and in connection with the retailing of women's ready-to-wear clothing, accessories and other consumer goods and products, respondent now causes and for some time last past has caused, certain of its credit customers to enter into binding retail contracts which are referred to by respondent as "layaways." Customers entering into these contracts are permitted, after making a downpayment, to select merchandise and defer the balance due. The merchandise is held by respondent until such balance is paid in full. Many, if not all, of these contracts contain the following provision:

> . . .If payments are not made regularly, or if 15 days are allowed to pass without a payment being made, claim on merchandise and deposit are forfeited. . .

Respondent, by and through the use of the above contract provision, denies customers the right to receive a refund of any amounts paid toward the purchase price of said merchandise upon default of the layaway contract.

The condition imposed upon respondent's layaway customers through the use of the above language and contract provision, is adhesive; is to the disadvantage of said customers; is not offset by any reasonable value received; and is included without regard to the actual risk of nonpayment or loss borne by respondent. Therefore, such contract provision is contrary to public policy and, the use of said contract provision was and is unfair.

PAR. 5. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in or affecting commerce, with corporations, partnerships, firms and individuals engaged in the sale of merchandise of the same general kind and nature as those sold by respondent.

PAR. 6. The aforementioned acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition, in or affecting commerce, and unfair acts and practices, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violations of the Truth In Lending Act, as amended, and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, as amended, the allegations of Paragraphs One and Two, hereof, are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 7. In the ordinary course and conduct of its business, as aforesaid, respondent is a creditor and regularly extends consumer credit, as "creditor" and "consumer credit" are defined in Regulation Z, the implementing regulation of the Truth In Lending Act, as amended, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 8. Subsequent to July 1, 1969, respondent in the ordinary course and conduct of its business as aforesaid, has caused and is causing customers to execute layaway contracts, as described in Paragraph Four herein, for the sale of merchandise. Under said contracts, customers agree to pay for merchandise in more than four installments. Also, under said contracts, said respondent retains the merchandise for the customers until the total price is paid in full. The contracts do not, however, clearly and conspicuously give to customers the right to revoke the purchase at any time prior to full payment of the total price and delivery of the merchandise, and to request and receive a full and prompt refund of any amounts paid toward the total price of the merchandise. Said respondent's layaway sales are, therefore, credit sales as "credit sale" is defined in Regulation Z. By and through the use of its layaway contracts, respondent:

1. Fails to make the consumer credit cost disclosures required by Section 226.8 of Regulation Z before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

2. Fails to use the term "cash price," as defined in Section 226.2(i) of Regulation Z to describe the purchase price of the goods, as required by Section 226.8(c)(1) of Regulation Z.

3. Fails to use the term "cash downpayment" to describe the

downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

4. Fails to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

5. Fails to use the term "amount financed" to describe the amount of credit of which the customer will have the actual use, as required by Section 226.8(c)(7) of Regulation Z.

6. Fails to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

7. Fails to disclose the number, amount, due dates or periods of payments scheduled to repay the indebtedness, and the sum of such payments using the term, "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

8. Fails to disclose a description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

PAR. 9. Pursuant to Section 103(s) of the Truth In Lending Act, as amended, respondent's aforesaid failure to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended, and the Truth In Lending Act and the regulations promulgated thereunder; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issued its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent S. Klein, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 1227 F St., NW, Washington, D.C.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the term "layaway" shall mean any transaction whereby the customer agrees to purchase goods or products at the time of the transaction, by means of a downpayment and subsequent payment or payments, with the respondent retaining possession of the goods or products until the agreed payment or payments are completed.

It is ordered, That respondent, S. Klein, Inc., a corporation, its successors and assigns and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and distribution of women's ready-to-wear clothing and accessories or any other consumer goods or products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

Entering into any layaway transaction, directly or by implication, either orally or in writing, unless the customer has no contractual obligation to make payments and may, at his or her option, revoke a purchase made under such transaction and receive prompt refund of any amounts paid toward the cash price of the merchandise, less a reasonable service charge not to exceed ten percent of the cash price, with a maximum of five dollars for merchandise costing ninety dollars or less and a maximum of ten dollars for merchandise costing more than ninety dollars; and, the customer receives the following written disclosure, clearly and conspicuously, at the time of the transaction, in not less than 10 point bold face type, of his or her rights and conditions to a prompt refund:

NOTICE OF YOUR RIGHT TO CANCEL

YOU MAY CANCEL THIS TRANSACTION AT ANY TIME AND RECEIVE A PROMPT REFUND OF ALL AMOUNTS PAID BY YOU, LESS A SERVICE CHARGE.

THE SERVICE CHARGE WILL BE NO MORE THAN 10% OF THE CASH PRICE WITH A MAXIMUM OF $5.00 FOR MERCHANDISE COSTING $90.00 OR LESS; AND A MAXIMUM OF $10.00 FOR MERCHANDISE COSTING MORE THAN $90.00.

IF YOU WANT TO CANCEL THIS TRANSACTION, YOU MUST DO SO IN PERSON AT THE STORE IN WHICH THE MERCHANDISE IS HELD.

It is further ordered, That respondent make prompt refund, of any amounts paid toward the cash price of merchandise, to customers who revoke purchases made under layaway transactions as described in the paragraph immediately above.

It is further ordered, That respondent make a cash refund or give a merchandise credit, at the customer's option, of all moneys known to be forfeited, or which should have been known to be forfeited, by its customers under layaway transactions, less a $1.00 service charge, from August 1, 1975, to the date this order becomes final, and in this connection respondent shall:

A. Compile a list of the names and last known addresses of all customers who entered into layaway transactions for the purchase of respondent's goods or products and who have forfeited moneys on said transactions during the period from August 1, 1975, to the date this order becomes final. Said list is to contain the individual amounts of such forfeitures.

B. Send notice letters, which are attached, herein, as Appendices A and B, within one month of the date this order becomes final, by first class mail, to each customer referred to in subparagraph A above, advising each customer of his or her right to a refund, the amount of the refund, and his or her option of receiving a cash refund or a merchandise credit; *provided, however*, that with respect to those customers whose letters are returned to respondent undelivered, respondent shall make a reasonable effort to obtain a current mailing address for each such customer. Respondent's obligation to make refunds under this paragraph of the order shall terminate after its efforts to send notice letters as outlined above have been unsuccessful, but in no event shall such obligations with respect to such customers referred to in subparagraph A above expire prior to one year after the date this order becomes final.

C. Make such refunds available immediately upon the receipt of the information set forth in Appendix B.

D. Maintain a list which contains the following data: name and address of each customer who received a refund; the date it was refunded; and the amount of such refund.

It is further ordered, That respondent, S. Klein, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with any extension of consumer credit or any advertisement to aid, promote, or assist, directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR 226) of the Truth In Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to make the consumer credit cost disclosure required by Section 226.8 of Regulation Z before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

2. Failing to use the term "cash price," as defined in Section 226.2(n) of Regulation Z, to describe the purchase price of the goods, as required by Section 226.8(c)(1) of Regulation Z.

3. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

4. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

5. Failing to use the term "amount financed" to describe the amount of credit of which the customer will have the actual use, as required by Section 226.8(c)(7) of Regulation Z.

6. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

7. Failing to disclose the number, amount, due dates or periods of payments scheduled to repay the indebtedness, and the sum of such

payments using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

8. Failing to disclose a description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

9. Failing in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondent shall forthwith deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in layaway sales, advertising or consummation of any extension of consumer credit, and that respondent secure a signed statement acknowledging receipt of said order from all such personnel.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent maintain at all times in the future, for a period of not less than three (3) years, complete business records to be furnished upon request to the staff of the Federal Trade Commission, relative to the manner and form of its continuing compliance with all the above terms and provisions of this order.

It is further ordered, That the respondent, herein, shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

____
(Date)

IMPORTANT NOTICE OF YOUR RIGHT TO A REFUND

Dear Customer:

S. Klein, Inc., has entered into an agreement with the Federal Trade Commission to give you a cash refund or, at your option, a merchandise credit for moneys forfeited by you as the result of your layaway transaction with us. All such refunds, however, are subject to a one dollar service charge.

Our store records indicate that your refund amounts to (amount). Any inquiries regarding this refund should be directed to S. Klein, Inc. at (telephone number).

In order to obtain this refund, please bring the enclosed form, in person, to our store located at 1227 F Street, N.W., Washington, D.C.

Sincerely,

S. Klein, Inc.

APPENDIX B

NOTICE OF ACCEPTANCE OF REFUND

I hereby accept the refund offered by S. Klein, Inc., and I have checked below the way that I wish to receive it.

1. ( ) Cash Refund
2. ( ) Merchandise Credit

____
Name (Please Print)

____
(Number & Street)

____
(City - State)

____
(Customer's Signature)

____
(Date)

NOTE: Bring this Notice to S. Klein, Inc. in person for a refund.

IN THE MATTER OF

PAY 'N PAK STORES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2780. Decision, Jan. 16, 1976 — Modifying Order, April 9, 1976

This order reopens proceeding and modifies a consent order issued on Jan. 16, 1976, 41 FR 9862, 87 F.T.C. 99, against a chain of hardware and plumbing supply stores by allowing a general limitation disclosure on "closeout" merchandise but not as to "clearance" merchandise; further, the disclosure requirements of order paragraphs III and IV.B are changed by deleting the word "specifically."

ORDER REOPENING THE PROCEEDING AND MODIFYING DECISION AND ORDER

On January 16, 1976, the Commission issued a decision and order against Pay 'N Pak Stores, Inc. in connection with the availability and pricing of advertised specials. The order includes a provision which allows Pay 'N Pak to advertise merchandise for sale when there is a clear and conspicuous disclosure of any specific exception, limitation or restriction with respect to store, item or price.

On October 31, 1979, Pay 'N Pak Stores, Inc. petitioned the Commission pursuant to Section 2.51 of the Commission's Organization, Procedures and Rules of Practice, 16 CFR 2.51, to reopen the proceeding and modify the decision and order to allow a more general limitation disclosure for "closeout" and "clearance" merchandise. "Closeout" merchandise was defined as merchandise whose entire inventory is being disposed of at a reduced price and which is not planned to be restocked. "Clearance" merchandise was defined as merchandise whose price has been reduced to reduce the inventory of such merchandise.

After due consideration, the Commission believes that the public interest will be served by modifying the decision and order to allow a general limitation on "closeout" merchandise but not as to "clearance" merchandise.

It is ordered, That the proceeding is reopened.

It is further ordered, That the decision and order issued on January 16, 1976 is modified as follows:

The following language is added to the first proviso in Provision I:

> **For closeout items, in instances where an advertisement is for more than one store, the specific limitation will be deemed to be complied with by disclosures that "quantities are limited to stock on hand" and that the items are closeout items. Closeout designation is only appropriate for items where Pay 'N Pak both is disposing of the entire inventory of**

an item at a reduced price and is not planning on restocking the item. For all advertised items not meeting the closeout exception, quantity limitations must specify the number available.

This addition will follow the sentence "Provided it shall be deemed a violation . . . the customer's specifications."

The disclosure requirements of III and IV.B are modified by deleting the word "specifically." Provision III will read:

III. *It is further ordered*, That respondent cease and desist from disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless the advertisement contains a statement that: "Each of the advertised items is required to be readily available for sale at or below the advertised price in each Pay 'N Pak store, except as noted in this ad," and a statement of the specific period during which the items will be available at the advertised prices.

Provision IV.B will read:

B. A statement that: "All items listed in the above advertisement are required to be readily available for sale at or below the advertised price, except as noted in the above advertisement."

IN THE MATTER OF

KETTLE MORAINE ELECTRIC, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3016. Complaint, April 16, 1980 — Decision, April 16, 1980

This consent order requires, among other things, a Kewaskum, Wis. manufacturer, distributor and installer of cellulose insulation to cease disseminating advertising or promotional material containing false or unsubstantiated representations concerning the performance characteristics of its products. The order further requires that scientific tests be conducted on insulation previously manufactured by the company and already installed to identify buildings that might contain inadequate fire resistant insulation. Owners of those buildings must be notified of the potential fire hazards, and substandard material timely replaced by insulation that meets government specifications. Should such replacement be declined, the firm must install a smoke detector system acceptable to the consumer.

Appearances

For the Commission: *Jerome S. Lamet.*

For the respondents: *Gerald Kiefer, McKenna & Kiefer*, Kewaskum, Wis.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Kettle Moraine Electric, Inc., a corporation, and Alois J. Beisbier, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kettle Moraine Electric, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business at 1261 Fond du Lac Ave., Kewaskum, Wisconsin.

Respondent Alois J. Beisbier is an officer of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of manufacturing, distributing, selling, advertising and installing cellulose insulation used in the walls, ceilings and attics of commercial and residential buildings. Cellulose insulation consists primarily of shredded paper and wood, which, unless properly treated chemically, is highly flammable.

PAR. 3. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents have, in the ordinary course and conduct of their business, represented directly or by implication in advertising and labeling that the insulation material manufactured, distributed, sold and installed by respondents is safe, non-flammable and in conformance with applicable state and federal standards.

PAR. 5. In truth and in fact:

A. Respondents' insulation product is not adequately treated with fire-retardant chemicals, and is flammable and highly dangerous when installed as insulation. At least one residential fire has occurred involving respondents' insulation product;

B. Respondents did not have and do not have, any reasonable basis for representing that the insulation product they manufacture, distribute, sell and install is non-flammable or meets applicable state and federal standards prior to making those claims; and

C. Respondents have failed to disclose to purchasers of their insulation product that the product is flammable and presents a substantial fire risk if installed as insulation.

PAR. 6. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts and practices, directly or by implication, has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 8. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Kettle Moraine Electric, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 1261 Fond du Lac Ave., in the City of Kewaskum, State of Wisconsin.

Respondent Alois J. Beisbier is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Kettle Moraine Electric, Inc., its subsidiaries, successors, assigns, officers and directors, and Alois J. Beisbier, individually and as an officer and director of Kettle Moraine Electric, Inc., and respondents' agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, offering for sale, sale or installation of cellulose insulation in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertising or promotional material which misrepresents the performance characteristics of respondents' cellulose insulation.
2. Disseminating or causing to be disseminated any advertisement or promotional material which makes any representation concerning respondents' cellulose insulation unless, at the time such representation is made, respondents have in their possession, and rely on, competent, reliable and well-controlled scientific tests which provide a reasonable basis to believe that the representations are truthful.

II

It is further ordered, That respondents shall conduct competent and reliable scientific tests, utilizing an independent testing laboratory on samples of cellulose insulation manufactured by respondents and installed in residences or other buildings, for which respondents do not have in their possession the results of competent and reliable scientific tests which establish that such insulation met or exceeded the applicable Federal flammability specifications at the time of manufacture. *Provided, however,* that, after being notified of the purpose of such tests, an owner of a residence or other building declines to have such tests conducted, respondents shall have no further obligation to conduct such tests. Such tests shall be to identify residences or other buildings containing cellulose insulation manufactured by respondents that may be inadequately fire resistant.

a. With respect to cellulose insulation manufactured during the period December 15, 1977 to April 1, 1978 tests shall be conducted on samples of cellulose insulation installed in all residences or other buildings. All tests must be completed within 120 days of the effective date of this order.

b. With respect to cellulose insulation manufactured during the period September 15, 1977 to December 14, 1977 tests shall be conducted on samples of cellulose insulation installed in residences or other buildings. Identification of those residences or other buildings from which samples of cellulose insulation will be taken for testing shall be by competent and reliable sampling procedures in accordance with acceptable statistical methods; *provided, however*, that identification of any cellulose insulation not meeting applicable Federal flammability standards at the time of manufacture will require respondents to conduct tests on samples of cellulose insulation from all remaining residences or other buildings. All tests must be conducted within 120 days of the effective date of this order.

III

It is further ordered, That respondents shall notify within 10 days of the completion of the tests conducted pursuant to order II, by certified or registered mail (return receipt requested), all consumers whose residences or other buildings are identified pursuant to such tests, as reasonably likely to contain insulation manufactured by respondents that does not meet the applicable Federal flammability specifications at the time of manufacture, that such insulation may be inadequately fire resistant.

IV

It is further ordered, That following the identification of residences or other buildings likely to contain cellulose insulation manufactured by respondents that does not meet the applicable Federal specifications at the time of manufacture:

a. With respect to cellulose insulation in ceilings and attics, respondents shall remove such cellulose insulation and replace it, without cost to the consumer, with insulation which meets the most current specifications established by the Consumer Product Safety Commission under the Emergency Interim Consumer Product Safety Standard Act of 1978 (Pub. Law 95-319) or any subsequent specifications or requirements of that agency, unless the consumer declines to permit removal or replacement. Such removal and replacement shall be performed within 120 days of consumer authorization.

b. With respect to cellulose insulation in walls:

(1) Where the cellulose insulation is installed behind a fire barrier such as 1/2 inch gypsum board or a fully enclosed dry wall, respondents shall deliver by certified or registered mail (return receipt requested) to each such consumer, within ten (10) days, the following notice:

The insulation we put in the walls of your house may pose a fire hazard. If possible, you should have it taken out. If you don't, we'll install a smoke detector alarm near those walls. We'll call you in a few days to find out whether you want the smoke detector. If you do, we'll install it within 30 days. There'll be no charge.

Make sure you don't overload any electrical wiring that runs through those walls. If you blow a fuse or trip a circuit breaker, have an electrician check the wiring right away. Don't change the fuse or push in the circuit breaker until this is done.

(2) Where the cellulose insulation is installed behind wood paneling but not behind a dry wall, respondents shall, without cost to the consumer, remove the paneling, and the cellulose insulation; replace the insulation with insulation which meets the current federal government specification cited above, and replace the wood paneling to its previous condition, unless the consumer declines to permit removal or replacement. Such removal and replacement shall be performed within 120 days of consumer authorization.

c. In any home in which cellulose insulation manufactured by respondents fails to pass the test conducted pursuant to order II (a) and (b), and respondent is either not required to remove the insulation pursuant to order IV b(1) or is required to remove the insulation pursuant to order IV b(2), but does not do so at the consumer's request, respondents shall install in a strategic location within thirty (30) days of the date of testing, a smoke detector alarm system acceptable to the home owner, unless the home owner declines to accept such installation.

V

It is further ordered, That respondents shall notify the Commission at least thirty days prior to any proposed change in the organization of the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

VI

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacture, distribution, sale or installation of cellulose insulation or of his affiliation with a new business or employment in which his own duties and responsibilities involve the manufacture, distribution, sale or installation of cellulose insulation. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, April 17, 1980

ORDER DIRECTING GENERAL COUNSEL TO SEEK COURT ENFORCEMENT OF SUBPOENA DUCES TECUM

In our order of March 28, 1980, we remanded to the administrative law judge a motion for court enforcement of a subpoena directed jointly to Copersucar, Ltd., and Mr. Jorge Atalla, Chairman of Hills Bros. We noted, however, that it appeared the subpoena had been properly served on Hills Bros., and that we would be willing to order the initiation of enforcement proceedings if a motion were made clearly to that effect.

General Foods has now filed such a motion, which has been certified to us by the administrative law judge. The motion requests enforcement of the subpoena "as limited," referring, we assume, to the ALJ's previous certification for enforcement, which limited the subpoena to Specifications 4 and 5. Accordingly,

It is ordered, That the General Counsel be, and hereby is, directed to seek court enforcement of Specifications 4 and 5 of the subpoena duces tecum issued on August 10, 1979.

In the Matter of

SEARS, ROEBUCK AND CO., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9104. Complaint, Nov. 4, 1977 — Final Order, April 28, 1980*

This order requires, among other things, a Chicago, Ill. department store chain to cease, in connection with the advertising and sale of dishwashers, representing that its dishwashers will completely clean dishes, pots and pans without prior rinsing and scraping; and claiming without substantiation that items placed in the top rack of the dishwashers will get as clean as those on the bottom rack. The company is prohibited from making claims regarding the performance of any major home appliance unless those claims are supported by reliable and competent tests. Respondent is further barred from misrepresenting the purpose, content or conclusions of tests, studies, reports or surveys, and required to maintain specified records for a period of three years.

Appearances

For the Commission: *Robert Barton, Mitchell Paul, Ronald Bogard, Laurence Kahn* and *Louise Kotoshirodo.*

For the respondents: *Arthur Medow,* Chicago, Ill., *Mark Schattner, Wald, Harkrader & Ross,* Washington, D.C., *Burton Y. Weitzenseld* and *Frank C. McAleer, Arnstein, Gluck, Weitzenseld & Minow,* Chicago, Ill. for respondent Sears, Roebuck and Co.; *Howard Abrahms,* New York City for respondent J. Walter Thompson Co.

Initial Decision by Daniel H. Hanscom, Administrative Law Judge

September 28, 1979

Preliminary Statement

On November 20, 1977, the Commission served its complaint in this proceeding on Sears, Roebuck and Co. ("Sears") and J. Walter Thompson Company charging them with disseminating deceptive and unfair advertisements in the course of an advertising campaign for Sears' dishwashing machines, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. More specifically, the complaint charged that respondents represented in national magazines and newspapers and over radio and television, without having a reasonable basis therefor, that: [2]

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* Complaint previously published at 94 F.T.C. 331.

1. the Lady Kenmore dishwasher would completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers;
2. dishes in the top rack of the Lady Kenmore dishwashers would get as clean as those in the bottom rack without prior rinsing or scraping;
3. the Lady Kenmore "Sani-Wash" cycle, by giving dishes an "extra-hot 155° final rinse," destroyed all harmful and other bacteria and microorganisms on the dishes and pots and pans.

In addition to the charge that Sears and its advertising agency, J. Walter Thompson, made the foregoing representations without a reasonable basis, the complaint further charged that the advertising was false because Sears' Lady Kenmore dishwasher would not completely remove, without prior rinsing or scraping, all residue and film from all dishes including pots and pans, and because the "Sani-wash" cycle did not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans.

The complaint also charged that respondents' advertisements were false in representing to the public that the demonstrations shown in the advertisements proved that Sears' Lady Kenmore dishwashers would completely remove, without prior rinsing or scraping, all residue and film remaining on dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers, when the contrary was the truth. Finally, the complaint charged that although respondents represented that pre-rinsing and pre-scraping were not necessary prior to washing eating and cooking dishes in the Lady Kenmore dishwasher, the Sears' Owners Manual, provided to purchasers, instructed them to pre-soak or pre-scour firmly cooked-on or baked-on foods. The complaint charged that these instructions in the Owners Manual were material "in light of the representations made in the advertising," that the advertising did not reveal the instructions, and was therefore deceptive and unfair.

Sears filed its answer to the complaint on January 19, 1978, denying most of the substantive allegations and raising four affirmative defenses. The affirmative defenses were: (1) that the challenged practices were abandoned by Sears; (2) that the challenged practices were industry-wide; (3) that the challenged advertising was insignificant and *de minimis* in scope; and (4) that the challenged advertising claims did not require prior substantiation because they [3]caused no material adverse effect upon the health or safety of consumers who, after using the product, were able to verify the claims for themselves and, if dissatisfied, could obtain a full refund.

Procedural History

The proceeding involved extensive pretrial activity including much controversy over discovery and motions of various kinds. Pretrial conferences were held on January 25, March 6, March 14, July 14 and September 26, 1978. On March 30 the undersigned denied motions of Sears and J. Walter Thompson seeking broad-scale discovery from third parties. On August 4, after oral argument held July 14, the undersigned granted complaint counsel's motion for partial summary decision with respect to Paragraphs 10, 13, 15, 18, and 20 of the complaint, ruling that the advertising conveyed the representations alleged.

In the meantime, J. Walter Thompson negotiated a consent settlement and on June 13 filed a motion to withdraw the complaint as to it from adjudication. On July 14 complaint counsel joined in this motion. The undersigned certified the motion to the Commission, and on July 19 the matter as to J. Walter Thompson was withdrawn from adjudication.

Hearings on the merits originally scheduled for September 6 were postponed to October 16 on which date the case-in-chief commenced. The presentation of complaint counsel's case took place in Washington, D.C., and concluded on November 20, 1978. Respondent Sears presented its defense in Chicago, Illinois, beginning on December 11, 1978, and concluding on January 26, 1979. Rebuttal hearings were held in Washington, D.C., on February 13–14, 1979.

On March 16, the undersigned excluded certain statistical evidence relative to Sears' advertising which had been received subject to check for accuracy by Sears, and ruled that the evidentiary phase of the case had been completed. In all, there were 28 actual hearing days. The record consists of 6,313 pages of transcript and several hundred exhibits, including a number of multipaged technical studies.

As an addendum to their proposed findings, complaint counsel moved that sanctions under Section 3.38 of the Rules of Practice should be imposed upon Sears, and disciplinary action should be taken against Sears' counsel for conduct related to discovery. Specifically, complaint counsel alleged that counsel for Sears did not comply in good faith with the orders of the undersigned to produce certain material. Sears filed separately its response to this motion of complaint counsel, and the undersigned has determined to address this issue in a separate document. The undersigned will not, however, exclude any documents from consideration (see CPF 364).

The proceeding is now before the administrative law judge for decision based upon the allegations of the complaint, the answer, the [4]evidence and the proposed findings of fact, conclusions and legal authority filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein, are rejected. The undersigned law judge, having considered the entire record, and all the contentions of respondent and complaint counsel, makes the following findings and conclusions, and issues the order to cease and desist at the end hereof.

Findings of Fact

I. Identity of Respondent and Nature of Its Business

1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at Sears Tower, Chicago, Ill. (Complaint ¶ 1 and Answer, p. 1). Sears, Roebuck and Co. is the world's largest retailer of general merchandise, is one of the nation's largest advertisers (Sears Answer Nos. 6 and 7 to Complaint Counsel's Second Request for Admissions) and is known to all.

2. Respondent Sears has been and is engaged in the advertising, distribution, and sale of portable and undercounter dishwashers, many of them under the "Lady Kenmore" brand name (Complaint ¶ 3 and Answer, p. 2). Estimated total dishwasher sales by Sears during the fiscal years 1971 through 1975 were as follows: $73,470,000 in 1971; $89,650,000 in 1972; $94,500,000 in 1973; $97,427,000 in 1974; and $114,000,000 in 1975 (CX 112A). Sears, in fact, has by far the largest percentage share of U.S. consumer dishwasher sales, its closest competitors being Kitchen Aid and General Electric (see order issued September 26, 1979, in connection with *in camera* transcript pages).

3. In the course and conduct of its business, Sears causes dishwashers when sold to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Sears maintains and, at all times mentioned herein, has maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Complaint ¶ 4 and Answer, p. 2). In the course and conduct of its business, Sears has been

and is in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of dishwashers (Complaint ¶ 5 and Answer, p. 2).

4. For the purpose of inducing the sale of its dishwashers and other consumer products, Sears has disseminated and caused the dissemination of advertising in national magazines, newspapers and other print media distributed across state lines, and in radio and television broadcasts transmitted by broadcasting stations located in various States of the United States and the District of Columbia [5]having sufficient power to carry such advertising across state lines. In addition, Sears had disseminated advertising in catalogs distributed by mail, and by other means, and through various outlets including point of sale (Complaint ¶ 8 and Answer, p. 3).

5. Respondent Sears, as stated, is the largest marketer of household dishwashing machines in the United States. In general, Sears' dishwashers are marketed under the "Kenmore" and "Lady Kenmore" brand names (Clifford, Tr. 4794), and this proceeding involves an advertising campaign for "Kenmore" and "Lady Kenmore" dishwashers (Tr. 478) which commenced in 1971 and continued through 1975 when the Commission began its investigation.

6. Dishwashers sold by Sears, including those sold during the period 1971 to 1975, were manufactured by Design and Manufacturing Corporation ("D&M"), located in Connorsville, Indiana (Cannon, Tr. 2442–43; Clifford, Tr. 4792; CX 83C, 187). The line of Sears' Kenmore dishwashers marketed from 1971 through 1975 was referred to as the "7200 line" (Clifford, Tr. 4993–94). They were available in both portable and undercounter models (CX 99A, 100A). Sears' 1971–1972 dishwashers ranged in price from $99.00 to $284.95 (CX 277C). Sears' 1973–1974 dishwashers ranged in price from $169.95 to $309.95 (CX 277Z007). The Lady Kenmore was the top model as well as the most expensive Sears' dishwasher sold from 1971 through 1975 (Cannon, Tr. 2496). Sears top-of-the-line dishwasher model is now called the "Sears Best" Kenmore dishwasher (Clifford, Tr. 4981).

7. Sears' dishwashers are equipped with a "macerator" blade with stainless steel teeth in the drain of the dishwasher (CX 83E, 338). The blade cuts up food so that it can wash down the drain and out of the dishwasher (CX 83E, 338). This blade and system, however, do not amount to a "garbage disposal" unit and Sears' dishwashers cannot be used as such. Sears' 7200 line dishwashers have two internal racks to hold dishes and other utensils. The upper rack is called the Roto-Rack. It is circular and is serviced by an upper spray tube which causes the rack to revolve during water agitation cycles. The lower rack is square

and is serviced by a lower spray arm (Fraser, Tr. 5240; CX 99B, 100B; 277Z008 - Z010).

8. The "7200 line" Lady Kenmore featured a "power wash" cycle in addition to "normal wash" cycle (CX 78B, 99G, 100G). Sears' "7200 line" Kenmore models lower in price than the Lady Kenmore featured only the "normal wash" (compare CX 277Z040-044, 046-049 with CX 277Z050). Sears stated that the "normal cycle" consisted of two wash cycles (phases) and four rinse cycles (phases) (CX 83Z002). In response to a question as to the phases of the "power wash" Sears advised the Commission on November 28, 1975, that the "normal cycle" on the Kenmore was substantially the same as the "power wash cycle" on the Lady Kenmore (CX 85A-C). **[6]**

II. The Challenged Advertisements Made the Representations Alleged in the Complaint

9. The record contains 54 advertisements for Sears' dishwashers (CX 345, pp. 1-3). The advertisements may be grouped into six categories: print advertisements in magazines of national circulation such as *Time, Reader's Digest, Family Circle, Sports Illustrated*, and *Better Homes and Gardens* (CX 1-3, 72-74); advertisements broadcast over national and local television (CX 4-10); advertisements in Sears' catalogs (CX 11-26); radio advertisements (CX 27-35); point of sale materials (CX 36-38); and newspaper advertisements (CX 39-54). The films and videotapes of the television commercials (CX 55-61, 265-66) are also in the record (CX 345, pp. 3-4, 20). The films of the various TV commercials are identified as follows: "Birthday Cake" (CX 55); "Weekend Clean Up" (CX 56); "Family-Revised" (CX 58); "Vicious Circle" (CX 59); "Freedom Maker" (CX 60); and "Pennypincher" (CX 61). These advertisements, including films and videotapes, were all considered by the undersigned in granting partial summary decision finding that the representations made in Sears' advertisements were as alleged in the complaint. Examples of the advertisement in issue are reprinted herein: CX 1 and CX 2 are print ads which appeared in magazines of national circulation; CX 4 and CX 5 are storyboards of TV ads broadcast over national television.

10. The dissemination schedules of Sears' advertisements are in the record (CX 62-77). Sears admitted the dissemination of CX 1 and CX 4 (Answer, p. 3). At trial, it was stipulated that CX 1-26 and CX 36-38 were disseminated (Tr. 496-97). The undersigned found that the other advertisements were disseminated in receiving CX 1 through CX 61 in evidence (Tr. 512-18). The schedules of publication for the national magazine advertisements (CX 1-3) from 1971 through 1974 were

introduced, respectively, as CX 71 through CX 74. The dissemination schedules for the various television commercials were as follows: CX 64A–F is the schedule for the "Birthday Cake" commercial (CX 4, 55); CX 65 is the schedule for "Weekend Clean Up" (CX 5, 56); CX 66 is the schedule for "Family" (CX 6, 57); CX 67 is the network television schedule and CX 68 is the spot television schedule for "Family-Revised" (CX 7, 58, 265, 266); CX 70 is the schedule for "Vicious Circle" (CX 8, 59); CX 77 is the schedule for "Freedom Maker" (CX 9, 60); and CX 69 is the schedule for "Pennypincher" (CX 10, 61; Tr. 485). These TV commercials were broadcast in the period between 1972 and 1975. The "Birthday Cake" commercial alone was disseminated for two and one-half years, from October 1972 through April 1975 (CX 64 A–F). The dissemination schedules for the catalog ads (CX 11A–26A) are set forth on each exhibit and are verified in CX 76 (Tr. 485). The dissemination schedule for the radio ads (CX 27–35) is shown as well as verified in CX 75 (Tr. 485). The initial dissemination for the point of sale brochures is shown on the face of the brochures (CX 36A–38A), and is verified in CX 63 (Tr. 485–86). The dissemination schedules for the newspaper ads (CX 39–54) are set forth on each exhibit and are verified in CX 62 (Tr. 486).

11. The undersigned granted complaint counsel's pretrial motion for partial summary decision and found, based on an examination of the advertisements in issue, including a viewing of the tapes of the [7] television advertisements, that the advertisements made the representations alleged in the complaint (Order Granting Complaint Counsel's Motion For Partial Summary Decision With Respect to Paragraphs Ten, Thirteen, Fifteen, Eighteen and Twenty Of The Complaint, issued August 4, 1978). Sears' advertisements unequivocally represented to the public that:

1. the Sears Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers;

2. dishes in the top rack of the dishwasher will get as clean as those on the bottom rack after one complete set of washing and rinsing cycles, without prior rinsing or scraping;

3. the "Sani-Wash" cycle destroys all harmful and other bacteria and microorganisms on dishes, pots and pans;

4. the demonstrations depicted and referred to in CX 1 and CX 4 and other advertisements prove that Sears' Lady Kenmore dishwashers will completely remove, without prior rinsing or scraping, all

residue and film remaining on all dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

12. In granting partial summary decision as to the representations in the advertisements, the undersigned also found that the Sears' Owners Manual (CX 99, 100), which is provided to purchasers of a Sears' dishwasher, instructed users to pre-soak or scour firmly cooked or baked-on foods.

13. The following findings are included in this decision to show the basis upon which the undersigned granted complaint counsel's pretrial motion for summary decision and found that the advertising of respondent Sears made the representations alleged in the complaint.

A. No Pre-rinsing or Pre-scraping

14. CX 1, the "do-it-itself" dishwasher, reprinted herein, was published over a two year period (CX 73, 74). It shows a dirty load of dishes being washed in the dishwasher, under which illustration appears in bold type the words, "Sears Lady Kenmore. The do-it-[8]itself dishwasher." The ad states categorically, "No scraping. No pre-rinsing," and assures the reader that "Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off." The advertisement tells the reader that "Sears Lady Kenmore does just about everything, itself. So you really do have freedom from scraping and pre-rinsing. That's why we call it The Freedom Maker." This advertisement also stated across the top that the demonstration pictured was "Certified by the Nationwide Consumer Testing Institute."

15. CX 2, also reprinted, was likewise published nationally. It contains a headline in bold print, "What Dishwasher Would Dare Load These Messy Dishes Without Scraping or Pre-Rinsing?" The ad assures the reader that the Lady Kenmore dishwasher gives "freedom from scraping and pre-rinsing" and states "Dishes, pots, pans, glasses, silverware all get hygienically clean . . . without any help from you." The photograph shows soiled cooking and baking dishes. This ad also contains under a picture of a loaded dishwasher the statement, "Demonstration certified by Nationwide Consumer Testing Institute."

16. CX 4, a TV commercial called "Birthday Cake," the storyboard of which is included herein, features a filmed demonstration showing the inside of the Sears' Lady Kenmore dishwasher washing eating and cooking dishes while the announcer tells the viewer that the Lady Kenmore dishwasher will give "freedom from scraping and freedom

from pre-rinsing," and has two hot water jets that "scour dishes." CX 4 was disseminated over a two and one-half year period over national hook-ups on all three television networks (CX 64A–F). It was shown on widely-viewed television programs such as the Olympics, World Series, "Julie Andrews Show," "Today Show," "Tonight Show," "Mary Tyler Moore Show," "Bob Newhart Show" and "Bob Hope Special" (CX 64A–F).

17. CX 5, "Weekend Clean Up," was broadcast over local TV in San Antonio, Kansas City, Waco, Texas, and Little Rock (CX 65). It shows dishes being washed in the dishwasher and spotless after being cleaned. The announcer states that the viewer will "never have to scrape or rinse again. Even dishes *crusty* with leftover food." The viewer is assured that the "Kenmore's 14 powerful hot water jets scour every dish clean . . . with no scraping or rinsing."

18. CX 8, a 30-second TV commercial "Vicious Circle," broadcast in 1974 in Oklahoma City, Dallas, Dayton, San Diego, El Paso, New Orleans, Phoenix, Milwaukee, and Seattle, among other cities (CX 70), shows a housewife washing dishes with a circular counter stacked high with dirty breakfast, lunch and dinner dishes. The audio portion informs the viewer that there is "[n]o need to scrape or pre-rinse, even 12 hours after eating." This commercial also assured the viewer of the truth of the representation with the superimposed statement "Demonstration Certified By the Nationwide Consumer Testing Institute." [9]

19. CX 9, "The Freedom Maker," was broadcast over local TV in 1974 in Oklahoma City, Dallas, San Diego, New Orleans, Albany, and Seattle among other cities (CX 77). The video shows a day's stack of dirty dishes, their loading and washing in the Lady Kenmore dishwasher, and "sparkling dishes" after washing. The audio proclaims, "no need to scrape or rinse off stuck-on leftovers."

20. CX 31, another radio commercial, promised: "Now you can have the portable dishwasher you've been dreaming about . . . . You'll like the way it makes pre-rinsing and soaking of heavily soiled dishes, pots and pans a thing of the past."

21. CX 33 told the listening public over radio that the Sears' Kenmore dishwasher was "precision engineered for superb dishwashing performance and reliability" and that it "[G]ets even the messiest baking dishes and roasting pans spotlessly clean . . . without prerinsing."

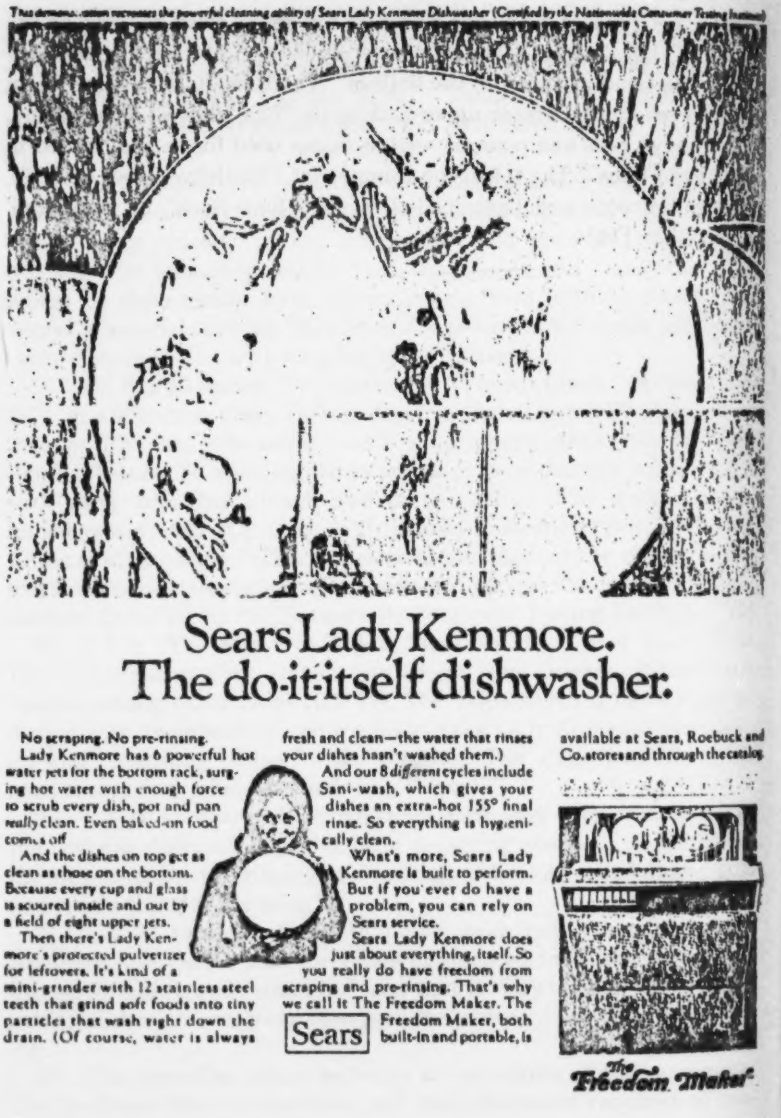
22. The preceding advertisements are examples of the representation by Sears that its Kenmore and Lady Kenmore required no prerinsing or pre-scraping of dishes, pots and pans. There are many other ads conveying this representation in the record: CX 3, 6, 7, 10, 28, 30, 32, 34, 36, 37, 38, 43, 45, 46, 47, 49 – 51, and 53.

B. Dishes in Top Rack Get As Clean As Dishes on Bottom Rack

23. CX 1 states, "And the dishes on top get as clean as those on the bottom." CX 2 states, "The exclusive revolving Roto-Rack gets dishes on top as clean as those on the bottom." The Roto-Rack is Sears' term for the revolving circular upper rack in its "7200" line of dishwashers. CX 2 shows pots and pans, as well as dishes used for eating, loaded in the "Roto-Rack." The television commercial, "Birthday Cake" (CX 55), also shows pots and pans loaded in the "Roto-Rack" of the Sears' dishwasher. [10]

CX-1

MAY 13 1974



This demonstration recreates the powerful cleaning ability of Sears Lady Kenmore Dishwasher (Certified by the Nationwide Consumer Testing Institute)

Sears Lady Kenmore. The do-it-itself dishwasher.

No scraping. No pre-rinsing.

Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan really clean. Even baked-on food comes off

And the dishes on top get as clean as those on the bottom. Because every cup and glass is scoured inside and out by a field of eight upper jets.

Then there's Lady Kenmore's protected pulverizer for leftovers. It's kind of a mini-grinder with 12 stainless steel teeth that grind soft foods into tiny particles that wash right down the drain. (Of course, water is always fresh and clean—the water that rinses your dishes hasn't washed them.)

And our 8 *different* cycles include Sani-wash, which gives your dishes an extra-hot 155° final rinse. So everything is hygienically clean.

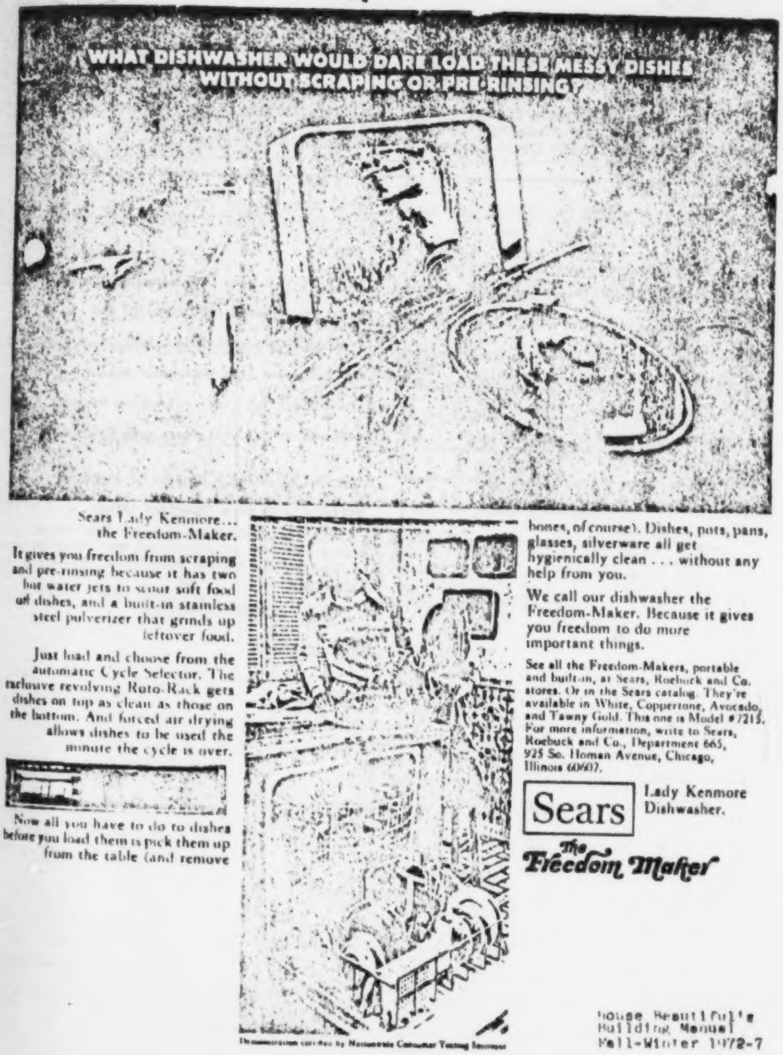
What's more, Sears Lady Kenmore is built to perform. But if you ever do have a problem, you can rely on Sears service.

Sears Lady Kenmore does just about everything, itself. So you really do have freedom from scraping and pre-rinsing. That's why we call it The Freedom Maker. The Freedom Maker, both built-in and portable, is available at Sears, Roebuck and Co. stores and through the catalog.

Sears

The Freedom Maker

CX-2



WHAT DISHWASHER WOULD DARE LOAD THESE MESSY DISHES WITHOUT SCRAPING OR PRE-RINSING?

Sears Lady Kenmore...
the Freedom-Maker.

It gives you freedom from scraping and pre-rinsing because it has two hot water jets to scour soft food off dishes, and a built-in stainless steel pulverizer that grinds up leftover food.

Just load and choose from the automatic Cycle Selector. The exclusive revolving Roto-Rack gets dishes on top as clean as those on the bottom. And forced air drying allows dishes to be used the minute the cycle is over.

Now all you have to do to dishes before you load them is pick them up from the table (and remove bones, of course). Dishes, pots, pans, glasses, silverware all get hygienically clean . . . without any help from you.

We call our dishwasher the Freedom-Maker. Because it gives you freedom to do more important things.

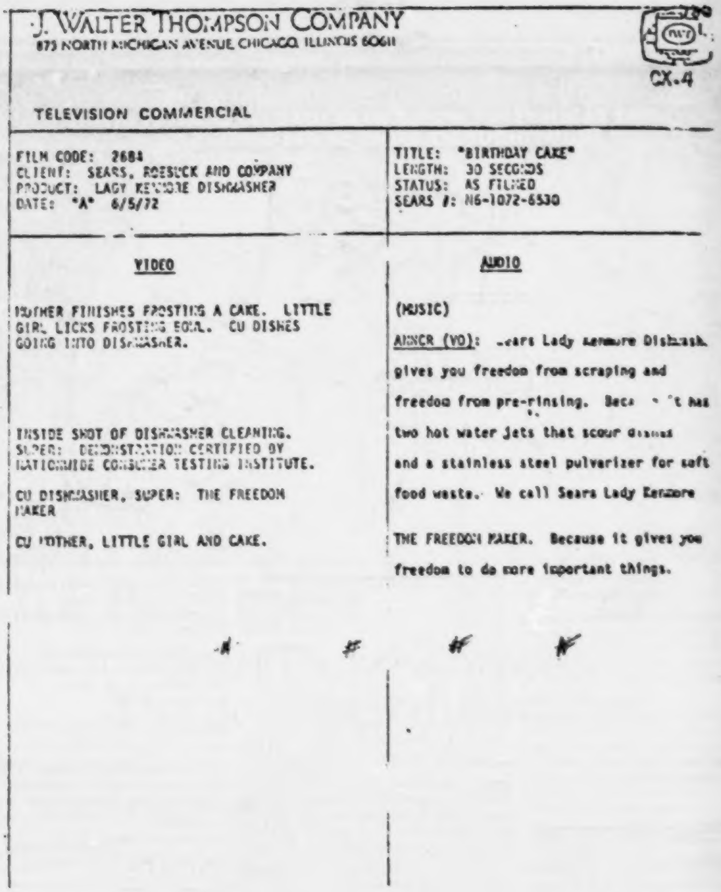
See all the Freedom-Makers, portable and built-in, at Sears, Roebuck and Co. stores. Or in the Sears catalog. They're available in White, Coppertone, Avocado, and Tawny Gold. This one is Model #7215. For more information, write to Sears, Roebuck and Co., Department 665, 925 So. Homan Avenue, Chicago, Illinois 60607.

Sears Lady Kenmore Dishwasher.

The Freedom Maker

Demonstration certified by Nationwide Consumer Testing Institute

House Beautiful's
Building Manual
Fall-Winter 1972-7



J. WALTER THOMPSON COMPANY
875 NORTH MICHIGAN AVENUE CHICAGO, ILLINOIS 60611

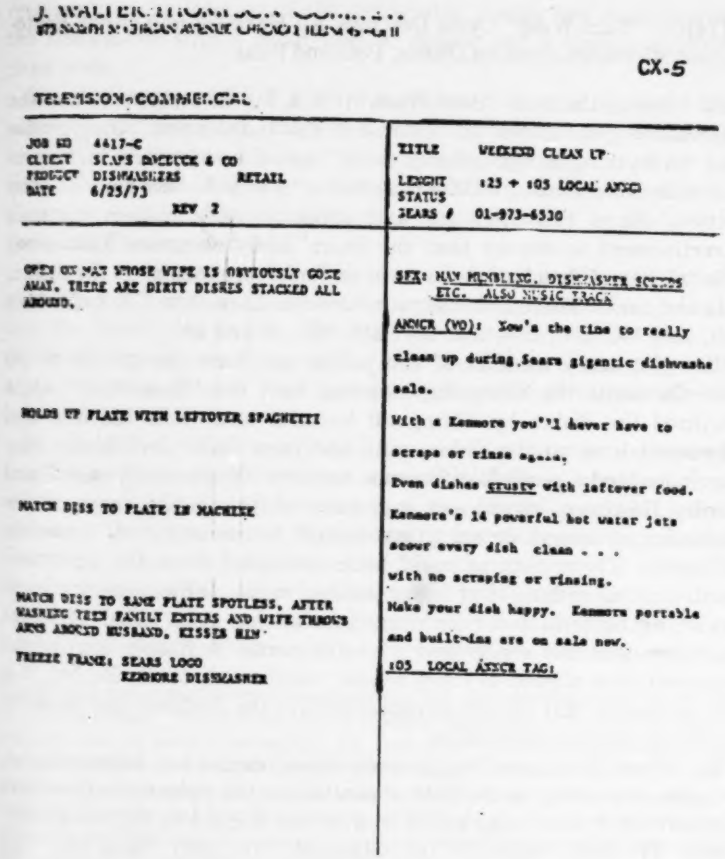
CX-4

TELEVISION COMMERCIAL

FILM CODE: 2684 CLIENT: SEARS, ROEBUCK AND COMPANY PRODUCT: LADY KENMORE DISHWASHER DATE: "A" 6/5/72	TITLE: "BIRTHDAY CAKE" LENGTH: 30 SECONDS STATUS: AS FILMED SEARS #: N6-1072-6530

VIDEO	AUDIO
MOTHER FINISHES FROSTING A CAKE. LITTLE GIRL LICKS FROSTING BOWL. CU DISHES GOING INTO DISHWASHER.	(MUSIC) ANNCR (VO): Sears Lady Kenmore Dishwash. gives you freedom from scraping and freedom from pre-rinsing. Because it has
INSIDE SHOT OF DISHWASHER CLEANING. SUPER: DEMONSTRATION CERTIFIED BY NATIONWIDE CONSUMER TESTING INSTITUTE.	two hot water jets that scour dishes and a stainless steel pulverizer for soft
CU DISHWASHER, SUPER: THE FREEDOM MAKER	food waste. We call Sears Lady Kenmore
CU MOTHER, LITTLE GIRL AND CAKE.	THE FREEDOM MAKER. Because it gives you freedom to do more important things.

# # # #



J. WALTER THOMPSON COMPANY
875 NORTH MICHIGAN AVENUE CHICAGO ILLINOIS [illegible]

CX-5

TELEVISION-COMMERCIAL

JOB NO	4417-C	TITLE	WEEKEND CLEAN UP
CLIENT	SEARS ROEBUCK & CO		
PRODUCT	DISHWASHERS RETAIL	LENGHT	:25 + :05 LOCAL ANNCR
DATE	6/25/73	STATUS	
	REV 2	SEARS #	01-973-6530

OPEN ON MAN WHOSE WIFE IS OBVIOUSLY GONE AWAY. THERE ARE DIRTY DISHES STACKED ALL AROUND.	SFX: MAN MUMBLING. DISHWASHER SOUNDS ETC. ALSO MUSIC TRACK ANNCR (VO): Now's the time to really clean up during Sears gigantic dishwashe sale.
HOLDS UP PLATE WITH LEFTOVER SPAGHETTI	With a Kenmore you''l never have to scrape or rinse again, Even dishes crusty with leftover food.
MATCH DISS TO PLATE IN MACHINE	Kenmore's 14 powerful hot water jets scour every dish clean . . . with no scraping or rinsing.
MATCH DISS TO SAME PLATE SPOTLESS, AFTER WASHING TEEN FAMILY ENTERS AND WIFE THROWS ARMS AROUND HUSBAND, KISSES HIM	Make your dish happy. Kenmore portable and built-ins are on sale now.
FREEZE FRAME: SEARS LOGO KENMORE DISHWASHER	:05 LOCAL ANNCR TAG:

[14]C. "Sani-Wash" Cycle Destroys All Harmful and Other Bacteria and Microorganisms on Dishes, Pots and Pans

24. Use of the term "Sani-Wash" (CX 1, 3), the statement that the dishwasher gives dishes an "extra-hot 155° final rinse," the promise that "everything is hygienically clean," and the reference, in connection with this promise, in CX 3 that this is "especially nice for . . . baby bottles," have the tendency and capacity with respect to each advertisement to convey that the Sears' Lady Kenmore dishwasher kills "all harmful and other bacteria and microorganisms on the dishes, pots and pans." There are other similar advertisements: CX 2, CX 11D, 13B, 15B, 15C, 18C, 19B, 22B, 23C, 24B, 25C, 45 and 46.

25. Not every member of the public may have derived from the advertisements the foregoing meaning that the "Sani-Wash" cycle sterilized the dishes by killing all harmful and other bacteria and microorganisms on the dishes, pots and pans. Some individuals may have perceived a possible difference between "hygienically clean" and sterile. However, significant segments of the public may not be sophisticated enough or analytical enough to consider such a possible difference. These persons could have concluded from the advertisements that all dishes, after being washed in the dishwasher, would be sterile, all bacteria and microorganisms having been killed. It is not necessary that the challenged advertisements inevitably convey the representation alleged to *every* reader, viewer or listener. Rather, it is only necessary that the advertisements have the tendency and capacity to convey such representation.

26. Even if the term "hygienically clean" means to a microbiologist, or to those working in the field of sanitation, the reduction of bacteria to a safe level, something which is in serious dispute in this record (Dr. Ordal, Tr. 5641, 6026–27; Dr. Charache, Tr. 6081, 6084–86), that meaning is not controlling if the advertising in its overall impression had the tendency and capacity to convey the representation that the "Sani-Wash" cycle sterilized dishes, pots and pans. The undersigned found, in granting partial summary decision, that Sears' advertisements had the tendency and capacity to convey this representation.

D. The Demonstrations Shown in Sears' Advertisements Purport To Prove That No Pre-rinsing and Pre-scraping Is Necessary

27. CX 1 prominently featured in italics at the top of the ad, as described, "This demonstration recreates the powerful cleaning ability of Sears Lady Kenmore Dishwasher (Certified by the Nationwide Consumer Testing Institute)." The advertisement contained pictures

representing the interior of the dishwasher during the washing cycle, the dishwasher with a clean load of dishes, and a woman holding a clean plate.

28. At the top of CX 2 there was a picture of what appeared to be heavily soiled pots and pans which would be difficult to clean. [15]In the center of the lower half of the ad there was a picture of an open dishwasher with visibly clean dishes, pots and pans in it. Under that picture was the statement "Demonstration Certified by Nationwide Consumer Testing Institute."

29. CX 4, "Birthday Cake," showed what apparently were heavily soiled and difficult to clean baking and cooking dishes being loaded into the Sears' dishwasher. The interior of the dishwasher was then shown during the washing cycle while the TV screen displayed the words, "Demonstration Certified by Nationwide Consumer Testing Institute."

30. In CX 8, "Vicious Circle," the video portrayed a housewife surrounded by a circular counter covered with dirty breakfast, lunch and dinner dishes. The dishwasher is shown being loaded. An interior picture of the dishwasher is then shown during the washing cycle while the words, "Demonstration Certified by the Nationwide Consumer Testing Institute," are superimposed on the television screen.

31. The law judge concluded in granting partial summary decision (Order of August 4, 1978) based on the preceding advertisements that:

> The pictured demonstrations were in conjunction with the representations "No scraping . . . No pre-rinsing", "you'll never have to scrape or rinse again", "No need to scrape or pre-rinse, even 12 hours after eating", etc. Such advertisements unquestionably made the representation that demonstrations were being shown which proved the allegation that "Sears Lady Kenmore dishwashers will completely remove, without prior rinsing or scraping, all residue and film remaining on all dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers."
>
> The contention that the demonstrations pictured in the advertisements represent that the dishwasher will completely remove, without prior rinsing or scraping *only* the specific foods shown in the demonstrations, spaghetti and cake residue, borders on the frivolous.

E. Sears Owners Manual

32. In granting partial summary decision as to the representations in the advertisements, the undersigned also found [16]that the Sears' Owners Manual which is provided to purchasers of a Sears' dishwasher, instructed users to pre-soak or scour firmly cooked or baked-on foods (CX 99, 100). This instruction is stated in the directions to users for preparing dishes, pots and pans for loading (CX 99D, 100D).

III. The Cleaning Performance Claim

A. General Considerations

33. Sears' no scraping, no pre-rinsing representation is unlimited in scope. There are no qualifications. The complaint, however, did graft a limitation by alleging that the representation promised cleaning without pre-rinsing or scraping of dishes, pots and pans soiled from "cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers." The Sears' advertisements were not construed by the complaint to promise cleaning without pre-scraping or pre-rinsing of eating and cooking dishes soiled in a kitchen disaster such as where something is left in the oven or on the stove for an excessive length of time and is severely burned.

34. Ruling out cooking disasters, it is true that there are all kinds of cooks, an almost infinite variety of cooking procedures, many types of cooking equipment, and many types of foods cooked in the U.S. These differences produce a tremendous range of food soils that require cleaning. The language of the complaint, "normal consumer recipes and under other circumstances normally and expectably encountered by consumers," encompasses all these myriad cooking conditions and resultant food soils, although precluding food soils caused by a cooking disaster. As complaint counsel correctly states, "There is no clear boundary in this area, nor are there any boundaries in the advertisements disseminated by Sears" (CPF 88).

35. Severely "stuck-on" or adhered food soils, baked-on food, and even blackening from burned-on food[1] are common phenomena in normal cooking. Although Sears has taken the position that burned-on food would not result from ordinary or typical procedures, the testimony in this case does not support that position. For instance, it is well known that some degree of baked-on food, blackening or burned-on food can result from browning foods, reheating foods in the same dishes in which they were cooked, or spilling foods onto the edge or outer surface of the dishes in which they were cooked. Such [17] adhered food soils do not result from disaster but, rather, from the many variables prevalent in normal cooking procedures. Sears' advertisements represented to the public that Sears' dishwashers would "completely remove" all of such soils, "No Scraping . . . No Prerinsing" being required. In short, except for cooking disasters and

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[1] "Burned-on food" refers to "material that has blackened and carbonized such as the sugar solution or sugar granules that you would take through the caramelization process browning them until they turn black" (Ferguson, Tr. 1680). "Baked-on food" refers to "food that adheres to the sides or bottom of utensils due to cooking procedures, such as baking or broiling or frying" (Ferguson, Tr. 1678).

unreasonable procedures, the representations in Sears' advertising encompassed the universe of cooking methods, soils, foods, utensils and dishes such as occurs in the kitchens of the nation's households.

36. A dish, pot or pan is clean when it is free of residue and film, and is not clean if it has soil on it following washing in a dishwasher. Food particles remaining on a dish or a utensil are not acceptable to most consumers whether the particles can be removed or not (Sullivan, Tr. 1640-41; Ferguson, Tr. 1690-91, 1747; Annis, Tr. 2285-86, 2312-13). This was also the view of Sears, which submitted as part of its substantiation for the cleaning performance claim a test conducted by Ms. Barbara Fraser, who testified for respondent, wherein it was stated: "any soil remaining at all on dishes is unacceptable" (CX 94C).

B. Sears Did Not Have a Reasonable Basis for the Cleaning Performance Claim

1. The Applicable Standards

37. Sears was required to possess a "reasonable basis" for the affirmative no scraping, no pre-rinsing product claim disseminated to the public. In view of the blanket and unlimited claim of no scraping, no pre-rinsing used by Sears to persuade the public to buy its dishwashers, such "reasonable basis" had to truly reflect the universe of food soils encountered in the nation's households, excluding only kitchen disasters and unreasonable cooking procedures.

38. Sears submitted prior to the issuance of the complaint in this case certain documentation in response to an order of the Commission under Section 6(b) of the Act ("6(b) Order"). This material is discussed in the next section of this decision. Some of the material can loosely be described as "tests." Although, as later described, the undersigned has concluded that Sears, under the circumstances of this case, was not required to have had as substantiation "scientific" tests, to the extent Sears relied on tests they were required to be competent and reliable. To be competent and reliable, the substantiating tests relied upon by Sears had to truly reflect the universe of food soils encompassed by its unqualified representation.

Competent and reliable tests further had to demonstrate that consideration had been given, in substantiating the claim, to the many variables which affect the cleaning performance of Sears' dishwashers. Among these factors are the following: detergent used and amount, voltage, mechanical function of dishwasher, number of washes and rinses and their precise duration, water temperature, [18]water hardness, type and number of cooking and eating dishes washed, loading of dishwasher, food soils used, method of food preparation and soiling of dishes, counteraging, cooking temperatures.

The foregoing are illustrative only and are listed simply to provide an indication of the factors competent and reliable tests should have given consideration to in determining, prior to dissemination of the representation, whether or not the Sears' dishwashers would perform in accordance with the representation.

Competent and reliable tests should have included information as to the scoring procedure used and the analysis of the results. Records should have been kept in sufficient detail so that the tests could be conducted again, and similar results obtained (Eberwein, Tr. 997–1133, 1387–94, 1399; Sullivan, Tr. 1517–21; Ferguson, Tr. 1664–66; Annis, Tr. 2267–71, 2273–75, 2277; CRB, p. 4).

39. Sears' "tests" did not meet the requirements for, and consequently were not, competent and reliable tests.

2. The Section 6(b) Order Material

In its proposed findings, Sears did not cite the material furnished to the Commission pursuant to the 6(b) Order as substantiation for its no scraping, no pre-rinsing representation (RPF, pp. 5–13). Instead, Sears submitted findings based upon different evidence introduced during its case-in-defense. According to Sears, "the documents submitted in response to the 6(b) Order reflect the dishwasher's cleaning ability *under conditions which are more rigorous than those experienced in the home*" (RRB, p. 5). Sears contends that the complaint limited the cleanability claims to "normal consumer conditions," and that Sears 6(b) documents "corroborate" the testimony on reasonable basis of a Sears' employee and an employee of the manufacturer of its dishwashers offered during its defense (RRB, pp. 5–6). Inasmuch as Sears does not disavow its 6(b) documentation as substantiation and as providing a reasonable basis for the no scraping, no pre-rinsing claim, that material is analyzed in the following findings.

40. Sears, Roebuck and Co. was served with an Order To File Special Report, dated July 10, 1975, issued under Section 6(b) of the Federal Trade Commission Act (CX 79) which required it to submit to the Commission the substantiation it possessed and relied upon for its advertisement, "Sears Lady Kenmore, The do-it-itself dishwasher" (CX 1, 79F, L). This ad was the last of a series of similar print advertisements for Sears' Lady Kenmore dishwashers, 1973–1974 models, which appeared in various national magazines during 1973 and 1974 (CX 82A, 83A). The 6(b) Order required substantiation for the claim that (CX 79F):

The Lady Kenmore dishwasher will, after one complete dishwashing cycle and when loaded according to instructions, remove [19]every visible particle of every type of cooked-on food from any pot or pan washed in the dishwasher, without prior scrubbing, scraping or rinsing of the pot or pan, and without regard to:

1. the type of, condition of, or surface of the pot or pan;
2. the length of time which the food was cooked;
3. the temperature at which the food was cooked;
4. the amount of food remaining and adhering to the pot or pan;
5. whether the food which remains in and adheres to the pot or pan has been burned and/or is crusty;
6. the length of time the food remains in the pot or pan before rinsing or washing in the dishwasher; and
7. the brand of dishwashing detergent used.

41. The 6(b) Order required that if Sears maintained that the claim was substantiated by materials in its possession, copies of all such materials were to be submitted, including expert opinion which was to be reduced to writing with the basis therefor (CX 79E, F). The 6(b) Order further required that if Sears possessed only part of the information demanded in any question, then such information as was available was to be provided along with an explanation of why the answer was incomplete. Sources from whom Sears knew further information could be obtained were to be identified. If Sears neither possessed the information demanded nor knew where it could be obtained, or believed that the claim was not capable of objective measurement, then the company was to state such facts (CX 79D).

42. By letter dated August 15, 1975, Sears submitted its response (CX 80). Mr. V.J. Graham, Vice President of Merchandising Administration for Sears, stated in a sworn affidavit accompanying the response that the response had been prepared with due care and was, to the best of his knowledge and belief, accurate, complete and responsive to the Order (CX 81).

43. Sears' response to the 6(b) Order consisted of a Special Report Summary (CX 82), the Special Report (CX 83), and 22 exhibits (see, CX 78A-C). All of these exhibits were offered in evidence by complaint counsel and were received by the undersigned.

44. Sears stated in its response: "The basis for substantiating the claim made in the advertisement, which is the subject of this Order, either as interpreted by the Commission . . . or as interpreted by Sears . . . [CX 83Z015-Z020], exists in the documents attached to this Report. Most of the documents attached are reports [20]of tests performed in 1972 and 1973 by the manufacturer of Sears' dishwashers, Design and Manufacturing Corporation, Connorsville, Indiana (hereinafter referred to as D&M)" (CX 83C).

45. In determining whether Sears' submission in response to the

Section 6(b) Order provided substantiation and constituted a reasonable basis for Sears' no pre-scraping, no pre-rinsing representation, the unqualified nature of that representation must be kept in focus. The materials submitted by Sears do not substantiate the no scraping, no pre-rinsing representation or show a reasonable basis for its dissemination.

46. The exhibits attached to the Sears' Special Report allegedly substantiating its claim were the following: Exhibit C, "Report on Comparison of Sears Dishwasher Model 587.71460 and Whirlpool Dishwasher Model STP-90E" (CX 88); Exhibit D, "D&M Performance, Revised March 1969" (CX 89); Exhibit E, "Adhered Soil" (CX 90); Exhibit F, a letter from D&M to Sears dated August 1, 1975 (CX 91); Exhibit G, "Extended Wash Time Tests (Baked-on Soil Tests)" (CX 92); Exhibit H, "D&M Dishwasher Performance Tests, Revised-July 1974" (CX 93); Exhibit I, "Engineering Report, I.E.C. Method for Testing Washing Performance of Pots and Pans" (CX 94); Exhibit J, "Technical Committee No. 59, Performance of Household Electrical Appliances" (CX 95); and Exhibit K, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher" (CX 96). Sears also submitted as Exhibit B (CX 87) an additional report by "Nationwide Consumer Testing Institute" entitled, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher, dated January, 1973" (CX 87). This test was performed in conjunction with preparation of the "do-it-itself" advertisement (CX 1, 83A-B).

47. The first D&M test discussed in Sears' response to the 6(b) Order was attached as Exhibit C (CX 88), "Report on Comparison of Sears Dishwasher Model 587.71460 and Whirlpool Dishwasher Model STP-90E," dated July 1969 (CX 83D-E). In its Special Report, Sears stated (CX 83E):

> Although Exhibit C (CX 88) is a report of a test of an earlier model of Sears dishwashers than the 1973-1974 model shown in the ad, which is the subject of this Order, the capability of the Sears dishwasher tested in 1969 and of the 1973-74 model to clean dishes which have not been pre-rinsed or pre-scraped is the same. . .
>
> . . . Exhibit C is illustrative of many tests performed at the D&M Center which demonstrate the capability of Sears dishwashers to clean dishes which have not been pre-rinsed or pre-scraped.

[21]48. The second D&M test document attached as an exhibit to the Special Report is Exhibit D, "D&M Performance Test" (CX 89), dated March 1969, in which D&M established testing procedures for evaluating the capability of dishwashers to remove adhered soils from the surfaces of dishes and handle various types of solid food particles that might remain on dishes due to the absence of pre-scraping or pre-

rinsing (CX 89D). Since CX 89 is merely a test procedure to follow in a dishwasher performance test and does not entail any actual testing, it cannot provide a reasonable basis, by itself, for the cleaning performance claim. The test procedure followed in CX 88 was the procedure established in CX 89 (CX 88F).

49. The purpose of the test reported in CX 88 was "to compare the ability of two dishwashers, Sears Model 587.71460 and Whirlpool model STP-90E, in their abilities in both aspects: removal of soil from dishes and removal of soil from the dishwasher" (CX 88E). As described later herein, the Sears' dishwasher did not get the cooking and eating dishes used in this test clean. Sears' argues, citing Mr. Eberwein, an expert called by complaint counsel, that this result should not be considered in judging CX 88 from the standpoint of substantiation of the Sears' claim because comparison tests are designed so that neither machine will get all of the dishes clean all of the time, thereby allowing some soil to remain for comparison purposes (Eberwein, Tr. 1178–80). There is no proof, however, that the food soils used in CX 88 and set out in CX 89 were so designed. In fact, the foods, soiling procedures and loading procedures utilized in this test (CX 89H–J, M–N) resulted in the types of food soils and dishwashing loads that fall within the ambit of Sears' unqualified claim as specified in the complaint. Foods such as french fried potatoes, canned cream corn, milk and corn flakes, coffee and pot roast were prepared much as the consumer would at home and the soils that resulted were not difficult to remove in a dishwasher (Sullivan, Tr. 1440–42). Respondent's contention that neither the soils nor the loading procedure were proper for tests of the Sears' dishwasher is rejected (see, RPF, p. 14; Fraser, Tr. 5198; Tr. 5206).

50. The utensils in which the food soils were prepared were not included in the test loads (CX 88E–G, O, P, R, S, 89D–E). Thus, test conditions were narrower in scope than a consumer would experience in home dishwashing conditions and were more limited than the advertising claim which stated that dishes, pots and pans used in cooking and baking would be completely cleaned without any prior treatment (Eberwein, Tr. 1041; Sullivan, Tr. 1440–42).

51. Above all, CX 88 does not substantiate the claim that the Sears' dishwasher will completely clean all dishes of all food soils without scraping or pre-rinsing because the report itself shows, as stated, that the Sears' dishwasher did not get the dishes clean. The washing results are clearly displayed on bar graphs (CX 88I, 88L) and show that the Sears' dishwasher tested did not clean the dishes by obtaining, at any time, a score of clean (Eberwein, Tr. 1041; Sullivan, Tr. 1446). [22]

52. In addition to the bar graphs, visual examination scores of the washing results are detailed at CX 88Z and CX 88Z001. These scores

show dirty dishes after washing and, therefore, do not show that the Sears' dishwasher can completely clean dishes without pre-scraping and pre-rinsing. In one test, the average percent clean was only 36% in the upper rack and 37% in the lower rack (CX 88Z). The following is quoted from Exhibit C showing the percent of unclean dishes after washing in the Sears dishwasher (CX 88Z):

RESULTS OF 13-POINT TESTS VISUAL EVALUATIONS

Dishwasher

Sears

Test Number	12	14	Average
* * * * * * *			
	Percent Retained Soil		
China	39.0	36.0	37.5
Silver	13.0	16.0	14.5

Notwithstanding these results showing an average in two tests of retained soil of 37.5% on china and 14.5% on silver, Sears in its response to the 6(b) Order stated, as just quoted, that "Exhibit C is illustrative of many tests performed at the D&M Center which demonstrate the capability of Sears dishwashers to clean dishes which have not been pre-rinsed or pre-scraped" (CX 83E). In view of the test results set out in Exhibit C showing unclean dishes after washing in the Sears' dishwasher, the foregoing statement in its answer to the Commission's Special Report Order is difficult to accept.

53. As further "substantiation" of its no pre-scraping, no pre-rinsing claim, Sears attached to its 6(b) response Exhibit E, which is a notebook containing a handwritten record by D&M laboratory technicians of various types of tests performed from September 1, 1972 to October 25, 1972, as well as two tests performed on August 4, 1973 and September 26, 1973 (CX 83H, 91A). This notebook was introduced into evidence as CX 90.

54. CX 90 reflects a series of developmental or exploratory tests whose purpose was to develop a reliable and repeatable testing procedure for difficult, baked-on food soils (Eberwein, Tr. 1080, 1082, 1382–83; Annis, Tr. 2380–81; Fraser, Tr. 5094, 5107).

55. Respondent contends that in most instances "the series of tests reflected in CX 90 do not reflect normal consumer recipes and [23] other circumstances normally and expectably encountered by consumers" (RPF 37). Respondent argues that in many of the instances in CX 90 where food soil was left on dishes after dishwashing, the food preparation procedure represented abnormal conditions because foods

were especially prepared to adhere to the cooking surface while, on the other hand, where the utensil was completely cleaned in the dishwasher, the food preparation procedure was normal (RPF 23–25, 31–36). Respondent relies on its witness Ms. Barbara Fraser, who testified that the CX 90 tests did not reflect normal consumer conditions because standard cooking procedures and recipes were usually manipulated or altered so as to produce atypical food soils which were more difficult to remove than typical food soils (Fraser, Tr. 5089, 5094–95, 5108–09). However, this testimony is neither persuasive nor credible. Furthermore, it is somewhat strange for Sears to make this objection to CX 90 because Sears did not advertise its dishwasher as a machine which had trouble removing difficult food soils from cooking and eating dishes. On the contrary, Sears' no scraping, no pre-rinsing representation was designed to convince the public that its dishwasher would remove the most difficult food soils from dishes including pots and pans, *e.g.*, "Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off" (CX 1). But the food soils in CX 90 were not even unusually difficult to remove, as described in the next finding.

56. Many of the foods and soiling procedures used in CX 90 did not result in soils that were unusually difficult to remove in a household dishwasher. For example, packaged macaroni and cheese, packaged cake mix, beans and egg soils, as well as other foods, prepared according to reasonably typical procedures or as per package directions, do not present particularly difficult conditions for a household dishwasher (Sullivan, Tr. 1470–71, 1475–76, 1478–79, 1484–85, 1522–23, 1531–37, 1550; Ferguson, Tr. 1694–97, 1701–06, 1708–12, 1722, 1732–33; Annis, Tr. 2288–90). The CX 90 tests did not include the tenacious types of food soils that would result from high temperature cooking in the 450°–500° range, such as for frying, roasting or broiling poultry, fish or meats (Sullivan, Tr. 1476; Ferguson, Tr. 1729–31; Annis, Tr. 2289). In fact, the cooking temperatures used in the testing were all in the low to moderate oven-temperature range, rarely going over 400° (Sullivan, Tr. 1476; Ferguson, Tr. 1729–31). Thus, the food soils tested by D&M and reported in CX 90 are food soils of the type which would frequently occur in the nation's households. Despite the relative ease of removal of some of the food soils, the tests resulted in cooking and eating dishes that were not clean in many instances (Sullivan, Tr. 1529–1638; Ferguson, Tr. 1722–24; CX 90C, D, E, H, J, L, M, N, O, P, Q, R, V, W, Z, Z003, Z005, Z012, Z015, Z034).

57. There are several methods used in conducting the CX 90 tests, moreover, that optimized the performance of the dishwasher. For

example, the use of rubber bands and weights to hold utensils down would result in increased, but atypical, water action and [24]cleaning performance (Sullivan, Tr. 1469–70, 1474, 1484; Ferguson, Tr. 1724–27; Annis, Tr. 2295–96; CX 90Z, Z001, Z005, Z007, Z009–10). Placing utensils horizontally on the dishwasher racks as was done in the CX 90 tests was the best position for optimum cleaning results. When utensils are placed at an angle so that more utensils fit into the dishwasher, which is typical of the home situation, the water spray may not hit every part of the dish and cleaning results are not as good (Eberwein, Tr. 1015–16; Sullivan, Tr. 1485–86, 1551). This was exactly the finding of the researcher who compiled CX 90 in noting, for an October 20, 1972 experiment, that when a casserole was placed at an angle, "The results were bad but perhaps typical of a home situation." (CX 90Z016).

58. There are other significant departures in the CX 90 test methodology from what would probably occur in substantial numbers of the nation's households. In one of the few instances where a water temperature was recorded, a temperature of 159° is shown (CX 90Z012). This is an unusually high temperature and would enhance cleaning performance (Sullivan, Tr. 1485, 1520). In a large number of the tests recorded in CX 90, from September 1, 1972 to September 19, 1972, "only the pots and pans in which food was baked were placed in the dishwasher for testing" amounting only to "one to five" items (CX 83Z). This constituted a light load such that it would be easier for the dishwasher to clean the few utensils inside. Furthermore, many of the tests extended the dishwasher wash phase beyond the normal cycle available to consumers, thereby allowing greater wash time than would be typical in the consumer's home (Sullivan, Tr. 1483, 1490–94, 1504–07, 1536, 1538; CX 83Z002–003, 90Z, R, C, Z014; Appendix A).

59. As a report, CX 90 does not comport with basic standards for a "competent and reliable" test. The recordkeeping procedures followed are inadequate (Sullivan, Tr. 1469, 1474, 1516; Ferguson, Tr. 1706, 1718–19, 1721; Annis, Tr. 2291). In many instances, CX 90 omits significant information and there are inaccuracies in the information reported (Eberwein, Tr. 1079–83; Sullivan, Tr. 1469–75, 1478–90, 1507–16, 1543–44; Ferguson, Tr. 1702–05, 1718–19, 1722, 1727; Annis, Tr. 1192, 1194, 1196, 2303; CX 90F–G, K–R, T–U).

60. More fundamentally, CX 90 does not substantiate or show that Sears had a reasonable basis for the claim that the Sears' dishwasher will completely remove, without prior rinsing or scraping, all residue and film from all dishes, pots and pans normally and expectably encountered by consumers (Eberwein, Tr. 1083, 1987–89; Sullivan, Tr. 1539–40; Ferguson, Tr. 1737–38; Dr. Godwin, Tr. 2146; Annis, Tr. 2305–06) because, like CX 88 (Sears Exhibit G to its Special Report), CX 90

shows that the dishes, pots and pans washed in the Sears' dishwasher still were not clean in many instances after washing. [25]

61. As part of its response to the 6(b) Order, Sears submitted charts which summarize the CX 90 tests (CX 83Z007–Z012). The charts have been included herein in Appendix A. The test results reported in these charts show that dishes and utensils, with considerable frequency, emerged from the Sears dishwasher not clean. In fact, out of a total of 211 instances reported in the chart summary of CX 90 tests, only 26 or 12.3% show results of clean, 100% clean or no retained soil. In those 26 experiments, furthermore, some cycles were extended beyond the time of the normal wash cycle available to consumers on production models. For example, seven of the eight tests run on August 4, 9 and September 26, 1973 show dishes "100%" clean, but the washing was all on an extended wash cycle not available to consumers purchasing the Lady Kenmore dishwasher (CX 83Z010). There are other examples in the Sears' submission which report extended wash cycles, rendering results showing clean dishes. These are of no relevance because the extended cycles used were not available to the purchasing public (CX 83Z008 – Z011). Excluding the CX 90 data for extended wash cycles from consideration, only 14 instances, or 6.6% of the 211 involved in the tests, resulted in completely clean dishes (Appendix A provides data supporting these figures). The tests recorded in CX 90 demonstrate a regular and consistent pattern of soil retention following washing in the Sears' dishwasher. Dirty dishes clearly do not provide substantiation or a reasonable basis for a claim of complete cleaning without prescraping or pre-rinsing (Eberwein, Tr. 1083–84; Sullivan, Tr. 1475, 1539–40; Ferguson, Tr. 1719–20, 1737–38; Annis, Tr. 2305–06).

62. Exhibit F (CX 91) is a letter with enclosures from William H. Yake, Staff Engineer at D&M, to Mr. Dave Raymond, of Sears' Law Department, dated August 1, 1975. The letter attempts to explain some terms and references in CX 90, and states that the dishwasher used in CX 90 had the same wash system as the Lady Kenmore of the "do-it-itself dishwasher" ad, CX 1. Exhibit F (CX 91) had also attached a copy of the D&M report, dated September 5, 1973, on tests conducted during September and October 1972. This report is also contained in Exhibit G and was introduced into the record as CX 92, discussed in the next finding (CX 83H). CX 91 does not provide a reasonable basis for the cleaning performance claim.

63. CX 92, "Extended Wash Time Tests (Baked on Soil Tests)," dated September 5, 1973, was offered by Sears as Exhibit G to substantiate the claim in CX 1 (83H). CX 92 was a test conducted by D&M with the purpose of devising an adhered or "baked-on" soil for cooking ware and a proper test load pattern, determining an optimum

time for an extended wash period in the D&M (Sears) dishwasher using the devised soil load, and to compare the D&M (Sears) machine, using such wash period, with the G.E. power scrub cycle (CX 92A).

64. CX 92 does not substantiate the claim that the Sears' dishwasher will completely clean all types of food residue from all [26]types of dishes without pre-scraping or pre-rinsing (Sullivan, Tr. 1557, 1559–60; Ferguson, Tr. 1742–43; Annis, Tr. 2310–11). This is true, again, because of the fact that the dishes emerged from the dishwasher not clean. As reiterated, a claim that the Sears' dishwasher cleans dishes, pots and pans without pre-scraping or pre-rinsing can not be substantiated by tests showing that dishes were still dirty after being washed in the Sears' machine.

65. Most of the tests reported on in CX 92 also deviated from what was available to the public in that they were run using extended wash cycles that were unavailable to consumers purchasing a Sears' dishwasher (CX 92A–B and 85B). Even these tests, with greater washing times, did not result in completely clean dishes (CX 92A–B) as promised in Sears' claim. CX 92 also reported three tests of the Sears' Lady Kenmore using the regular cycle (CX 85A–B) available to consumers who buy the machine with the following results (CX 92B):

* * * * * * *

4. Also 3 tests using regular cycle:

W R R W R R (WITH TIMER)

% RETAINED SOIL

TEST #	OATMEAL	MACARONI	CAKE	OMELET
1	2%	30%	20%	5%
2	20%	50%	20%	2%
3	35%	60%	60%	20%

The term "retained soil" means precisely what one would assume, *i.e.*, food soil was left on the dishes and they were not clean after washing in the dishwasher. Averaging the three tests for each food soil tested, 19% of the dishes in which oatmeal was cooked had retained soil, 46% of the dishes in which the macaroni was cooked had retained soil, 33% of the dishes in which cake had been made had retained soil and 9% of the dishes in which omelets had been cooked had retained soil. Such statistics obviously do not substantiate or show a reasonable basis for Sears' unqualified claim (Sullivan, Tr. 1559–60; Ferguson, Tr. 1742–43; Annis, Tr. 2310–11).

66. Beyond the fact that CX 92 shows that the dishes washed in the Sears' dishwasher emerged still largely dirty, and hence cannot substantiate a no scraping, no pre-rinsing claim, the test methodology

in CX 92 reveals inadequate test procedures. There are no indications of how any of the foods were prepared, how the food soils were applied, how the dishes were scored following washing, what model dishwasher was tested and what water temperature was used (Ferguson, Tr. 1738–39, 1741, 1746; Annis, Tr. 2307–08). The only four food soils tested were cake, macaroni and cheese, oatmeal and egg omelets (CX 92A). The soils do not cover the range of soils [27]encountered in the nation's households (Ferguson, Tr. 1738, 1743; Annis, Tr. 2307). The dishwasher was not loaded to produce a representative and fair test. The soiled cooking dishes were all placed in a horizontal position on the bottom rack so that, as stated in the report, they would receive "maximum water action" (CX 92A). This loading procedure is not typical of consumer use since the placement of dishes solely on the lower rack could cut off water to the top rack and would maximize the cleaning performance of the dishwasher (Sullivan, Tr. 1557–58; Ferguson, Tr. 1741–42; Annis, Tr. 2309–10). The only items loaded into the dishwasher in the tests were the four utensils containing the four types of food soils tested, also atypical of normal consumer procedures (Fraser, Tr. 5199–5200; CX 92D–G).

67. Exhibit H (CX 93) is the D&M test protocol, as revised in July 1974, entitled "D&M Dishwasher Performance Tests," which incorporated the procedure that was developed in 1972 to test for baked-on food removal (CX 83H). Sears stated in its response to the 6(b) Order that this procedure was used from 1972 to 1974 by D&M in its testing to develop a new model dishwasher, and that tests utilizing this procedure were run on dishwashers modified from the 1973–1974 model depicted in the advertisement, *i.e.*, CX 1, subject of the 6(b) Order (CX 83H, 93D). Since CX 93 is merely a test procedure to follow in a dishwasher performance test and does not entail any actual testing, it cannot provide a reasonable basis, by itself, for the cleaning performance claim.

68. Another of the documents provided by Sears to substantiate the no scraping, no pre-rinsing claim was CX 94, Exhibit I of the Sears' Special Report, entitled "I.E.C. Method For Testing Washing Performance of Pots and Pans," and dated October 31, 1974 (CX 83H–I). The letters "I.E.C." stand for "International Electrotechnical Commission." Exhibit J (CX 95) is a proposed test protocol issued by the I.E.C., dated September 1974, for measuring washing performance of pots and pans, including types of soil and test procedures to be followed. This test protocol was followed in the test reported in CX 94. Since CX 95 is merely a test procedure to follow in a dishwasher performance test and does not entail any actual testing, it cannot provide a reasonable basis, by itself, for the cleaning performance claim.

69. CX 94 does not substantiate Sears' advertising claims or provide a reasonable basis for those claims. The dishwasher tested was not even a Sears dishwasher; instead, it was a "Gibson" (CX 94D). The Gibson dishwasher has a square upper rack, not the round, rotating rack of the Sears' Lady Kenmore (CX 94D, 99D, 100D). See also the picture in Sears' advertisements, for example, CX 2. The fact that D&M also manufactures the Gibson dishwasher, according to Sears to "similar" operating specifications (CX 83G), does not qualify tests on the Gibson as substantiation for claims regarding Sears' Lady Kenmore. The substantial difference in construction might well mean other differences not shown by this record and not mentioned by Sears. [28]

70. The food soils tested in CX 94 resulted from boiling milk, preparing Wheatena and preparing a macaroni and cheese mixture; two stainless steel saucepans and two glass casserole dishes were soiled (CX 95B–C, 94B). The milk was brought to boiling temperature, allowed to boil for 10 minutes and emptied, leaving milk residue in the pan which was allowed to cool at room temperature. After applying a thin layer of Wheatena to a saucepan, the soiled pan was placed in an oven at 200° (95° C.) for 15 minutes and then allowed to cool at room temperature. A thin layer of the macaroni and cheese mixture was applied to each casserole dish which was then baked at 400° F. (200° C.) for 20 minutes and allowed to cool at room temperature (CX 95C, 94B). In preparing the Wheatena the directions given to the D&M technician were not followed in that skim milk was not used (CX 94B). The report noted that "[t]he baking time (15 minutes at 200° F.) was not nearly enough to have the soil adhere" (CX 94B). The caseinates found in milk are well-known adhesives and the omission of skim milk from the Wheatena plus the low baking temperature would make that test much easier (Sullivan, Tr. 1448–50, 1452). The milk residue would have been a difficult soil to remove (Sullivan, Tr. 1453).

71. The test protocol called for the four soiled utensils to be loaded into the dishwasher along with the maximum number of unsoiled place settings that would fit (CX 94B, 95B–D). Six 11-piece place settings, along with the four utensils, were loaded into the dishwasher for a total of 70 pieces (CX 83Z001). A grid scoring system was used to evaluate the cleaning results on the casserole dishes and a visual estimate of the percentage of area cleaned to evaluate the saucepans. The grid system involved a sheet of paper with 1832 squares drawn on it, cut to the shape of the surface area of the casseroles. The soil not removed by the dishwasher was then equated into grid squares of soil and the percent clean determined (CX 94C, 95D).

72. Aside from the fact that CX 94 tested a Gibson dishwasher and

not a Sears', the results, even if given consideration, do not substantiate Sears' advertising claims. As in the case of previous substantiating documents furnished by Sears and received in evidence in this proceeding, the dishes in the test came out dirty (CX 94C). In comment on the cooking, according to the report, the baked macaroni and cheese mixture was "burned black" (CX 94B). In reporting the results, Ms. Fraser, an employee of D&M, stated in the test document that, "The dishwasher was covered as well as the dishes with burned particles of macaroni and cheese. I question whether the dishes should be evaluated also" (CX 94C). The casserole washed in the upper rack was evaluated and 93 squares were reported as soiled out of 1832 squares of area. How it could transpire that "the dishwasher was covered as well as the dishes with burned particles of macaroni and cheese" and yet only 93 squares of area out of 1832 of the casserole remain soiled is not explained by CX 94. Ignoring that, however, 93 soiled squares out of 1832 still mean the casserole was not clean. Furthermore, the other three utensils did [29]not come out entirely clean either (CX 94C). In this report, Ms. Fraser states, "any soil remaining at all on dishes is unacceptable" (CX 94C). Since the utensils tested were still dirty to some degree after washing, CX 94 is rejected as substantiation for Sears' no scraping, no pre-rinsing claim (Ferguson, Tr. 1747–48; Annis, Tr. 2313–14).

73. As already described, CX 4 told the viewing public: "Sears Lady Kenmore gives you freedom from scraping and freedom from pre-rinsing . . . . Because it has two hot water jets that scour dishes . . . ." This TV commercial, "Birthday Cake," superimposed the representation, "Demonstration Certified By Nationwide Consumer Testing Institute," onto the TV screen (CX 4). The same representation was also included in the two print ads, CX 1 and 2. Sears submitted in substantiation of the no scraping, no pre-rinsing claim, and to support this representation, Exhibit K, entitled, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher," dated May 1972 (CX 96).

74. As substantiation or a reasonable basis for the representation in CX 4, the CX 96 report is unacceptable. The purpose of CX 96 was to support the advertised capability of the 1973–74 Sears' Lady Kenmore dishwasher to remove baked-on food without pre-scraping or pre-rinsing (CX 83I). To "test" the Lady Kenmore, Nationwide Consumer Testing Institute used a food soil resulting from baking two "Betty Crocker German Chocolate Cakes" and preparing a "Betty Crocker Frosting Mix." The chocolate cake was baked in Pyrex Corning cake dishes. The frosting mix was prepared in a Pyrex Corning bowl. Baking of the cakes was at 325° for 30 minutes (CX 96C, F). The two

Pyrex cake dishes and the bowl in which the frosting mix was prepared were washed in the Lady Kenmore using 100 grams, slightly over 3 ounces, of Cascade detergent (CX 96C). Pyrex glass utensils, such as were used in this demonstration, would be easier to clean than metal utensils (Sullivan, Tr. 1568–69). After the wash cycle, the report stated that the utensils were free of any traces of chocolate residue (CX 96C, 83G).

75. Chocolate cake and frosting are not truly representative of the enormous variety of food soils "normally and expectably encountered" in the public's kitchens. Chocolate cake and frosting mix are food soils that are easy to remove; they melt away with hot water (Eberwein, Tr. 1073–77; Sullivan, Tr. 1570–71; Ferguson, Tr. 1749–50; Annis, Tr. 2316). Even without any detergent in the dishwasher, these soils surely would have been removed (Eberwein, Tr. 1078). Only two "Pyrex Corning Cake Dishes" and a "large Pyrex Corning bowl" were washed in the Lady Kenmore according to CX 96; no other dishes were washed (CX 96C, 83Z001). A dishwashing load of three utensils would constitute a very light load which would be easier to clean than a full load (Eberwein, Tr. 1077; Ferguson, Tr. 1753; Annis, Tr. 1319–20). CX 96 does not make clear whether counteraging procedures were followed. If the utensils were washed when the soils were still fresh, the dishwasher's cleaning performance would be enhanced (Eberwein, Tr. 1074; Sullivan, Tr. 1570; Ferguson, [30]Tr. 1750; Annis, Tr. 2315–16). Nationwide used 100 grams (3 ounces) of detergent, an excessive amount even for a full load (Eberwein, Tr. 1077–78; Sullivan, Tr. 1564, 1567–69, 1571–73; Ferguson, Tr. 1751–53, 1756, 1759, 1765; Annis, Tr. 2321–22, 2324). Such an excessive amount of detergent would not usually be used in the household, might even damage delicate dishes, far exceeds the amount recommended for a dishwasher load on the detergent package itself (2 to 2-1/2 tablespoons) and far exceeds the amount of detergent (28.4 grams) used in all tests at D&M or any other test involved in this proceeding (Sullivan, Tr. 1562, 1567–69, 1571, 1753; Ferguson, Tr. 1751, 1753, 1756, 1759; Annis, Tr. 2324, 2326; CX 83Z001, 337A–D). CX 96 does not constitute adequate substantiation for the no scraping, no pre-rinsing claim (Eberwein, Tr. 1067–68, 1078; Sullivan, Tr. 1567, 1569, 1571–72; Ferguson, Tr. 1759–62; Annis, Tr. 2326–28).

76. Aside from the factors in the preceding finding, there are other aspects of CX 96 which create substantial question as to the adequacy of that exhibit to substantiate or to provide a reasonable basis for the no scraping, no pre-rinsing claim of the TV commercial "Birthday Cake." CX 96 does not explain why so much detergent was placed in the dishwasher and doesn't describe the "rinse solution." The report fails to note the water temperature, voltage, water hardness or water

pressure. The method of food preparation and the soiling procedure are not specified in detail. The method of scoring is not explained and any counteraging procedures which might have been followed were omitted (Eberwein, Tr. 1066–67; Sullivan, Tr. 1567, 1570; Ferguson, Tr. 1749, 1753; Annis, Tr. 2315–17, 2319, 2321, 2329; CX 83Z001). The recordkeeping procedures are so inadequate that others cannot properly evaluate the demonstration and cannot draw conclusions about the performance of the dishwasher. There is insufficient disclosure of details to permit anyone to evaluate and reproduce the test procedures. CX 96 is not an acceptable report of a test (Eberwein, Tr. 1066; Sullivan, Tr. 1567, 1572; Ferguson, Tr. 1749; Annis, Tr. 2314–15) and does not constitute a "competent and reliable" test.

77. Another report of a demonstration certified by the Nationwide Consumer Testing Institute, Inc., was supplied by Sears in its Special Report as Exhibit B (CX 87) to substantiate the no scraping, no pre-rinsing claim made in CX 1, the "do-it-itself dishwasher" ad. This demonstration was also referred to in the "Vicious Circle" television commercial, CX 8 (CX 59 is the film of the commercial), disseminated in 1974 (CX 8, 59, 70). The CX 87 report is entitled, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher," dated January 1973 (CX 87). The purpose of the demonstration was to "recreate" the dishwasher's cleaning ability for use in a print advertisement (CX 87B).

78. In general, the factors discussed in the preceding findings relating to CX 96 apply to CX 87. CX 87 does not substantiate or provide a reasonable basis for the claim that the Sears Lady Kenmore will completely clean all types of food residue from all types of [31] dishes without pre-scraping and pre-rinsing (Eberwein, Tr. 1061–62, 1064; Sullivan, Tr. 1578–79; Ferguson, Tr. 1765–66; Annis, Tr. 2342–44). The food soils are far too limited and the test conditions are too easy to support the unqualified, blanket Sears claim. The soils tested in this demonstration were spaghetti with meat sauce, meat loaf with mushroom sauce, scalloped potatoes, spinach, molasses, and thousand island dressing (CX 87C). These food soils are generally not difficult soils to remove in a household dishwasher (Eberwein, Tr. 1050–51; Sullivan, Tr. 1576–77; Ferguson, Tr. 1763; Annis, Tr. 2334; Cannon, Tr. 2567–68). The food soils are not fully representative of the universe of food soils "normally and expectably encountered" in the kitchens of the public (Eberwein, Tr. 1061–62; Ferguson, Tr. 1765–66; Annis, Tr. 2342–43). The report states that the dishes were allowed to counterage for two hours, after which they were placed in the dishwasher without any pre-treatment (CX 87B). Twenty-six dishes, eight glasses, two casserole dishes and one pan, for a total of 37 pieces, along with 29

pieces of cutlery, were loaded into the dishwasher for washing with 50 grams of Cascade Dishwashing Detergent (CX 87B, D).

79. For the results of the demonstration, the report states that after normal operation, "[a]ll dishes were washed perfectly clean. Each dish was inspected and showed no residue of any kind remaining on the dish" (CX 87B). However, in direct contradiction to the statement that each and every utensil was inspected, Ms. Judy Cannon, who was the Sears Home Economist involved in the demonstration (CX 87B), testified that the Nationwide Consumer Testing Institute witness did not inspect all the dishes but only selected and inspected several from each rack (Cannon, Tr. 2576–77). Thus, the conclusion that all the dishes were clean is without verification and is rejected.

80. As in the case of CX 96, there were other basic deficiencies rendering CX 87 not a methodologically competent and reliable test. The report fails to explain the test procedure such as the food preparation procedure, fails to indicate which items were soiled with which soil, fails to show how much food residue was on the utensils and how the soil was applied, fails to describe water temperature or voltage, and fails to provide any information on the loading and scoring procedure utilized (Eberwein, Tr. 1059–61, 1064; Sullivan, Tr. 1575–78; Ferguson, Tr. 1763–64; Annis, Tr. 2332–37). The available data would not allow a researcher to reproduce the demonstration or evaluate the test (Ferguson, Tr. 1763; Annis, Tr. 2333).

81. None of the other documents furnished by Sears in its Special Report substantiate the claim. CX 89, 91, 93, and 95 do not provide substantiation for the reasons set forth in earlier findings. CX 97 is a copy of an ad, CX 2. CX 98 is a diagram of Kenmore portable dishwasher parts, and CX 99 and CX 100 are Sears' Owners Manuals.

82. None of the documents submitted by Sears in its Special [32] Report (CX 78 through CX 100) substantiate or provide a reasonable basis for the no scraping, no pre-rinsing representation in Sears advertisements.

3. The Evidence Offered by Sears during the Case-in-Defense

83. During hearings in this proceeding in December 1978 and January 1979, Sears attempted to substantiate and to show that it had a reasonable basis for the no scraping, no pre-rinsing claim by eliciting testimony from James H. Clifford, a long-term Sears' employee and "national buyer" for Sears' dishwashers, who handled procurement of Sears' dishwashers from D&M, and from Barbara Fraser, an employee of D&M, the firm which manufactured Sears' Kenmore dishwashers, including the Lady Kenmore.

84. This testimony was brought up for the first time during hearings in this proceeding. None of it was mentioned by Sears as substantiation in its Special Report filed August 20, 1975, even though the Commission specifically instructed Sears in its Order to include substantiation in the form of expert opinion together with the bases therefor to "be signed by the person whose opinion is relied upon" (CX 79E). In submitting its Special Report in 1975, Mr. V.J. Graham, Vice President of Merchandising Administration for Sears, stated under oath (CX 81):

> Attached is Sears Response to the Commission's Order to Sears, Roebuck and Co. to file a Special Report concerning a magazine advertisement for Sears Lady Kenmore dishwashers run by the Company in the December 1974 issue of Reader's Digest.
>
> The attached Response was prepared by personnel under my supervision from the books and records of the Company, as well as from the direct knowledge of the personnel who prepared the responses.
>
> The Response has been prepared with due care and is, to the best of my knowledge and belief, accurate, complete and responsive to the Order.

Notwithstanding this sworn representation to the Commission in 1975 that the material submitted with its Special Report was "complete and responsive to the Order," Sears offered other and new evidence in this proceeding in the form of the testimony of Mr. Clifford and Ms. Fraser. [33]

85. Complaint counsel objected to receipt of the testimony of Mr. Clifford and Ms. Fraser, contending that "Sears is totally estopped from asserting evidence of a new form of alleged reasonable basis at this point in these proceedings," that the evidence is "directly inconsistent with [Sears] prior sworn statement to the Commission" that its 1975 Special Report was "complete," and that "Sears is thus allegedly liable under Section 10 of the FTC Act for making a false statement of fact in a required report" (CRB, p. 2).

86. Sears was served with the 6(b) Order and submitted its Special Report prior to the time Section 3.40 of the Commission's Rules was amended to prohibit the reception of evidence in an adjudicative proceeding to substantiate a claim when such evidence was not provided in a prior Special Report. In view of this fact, the Commission's decision in *Ford Motor Company*, 87 F.T.C. 756, 797–98 (1976), and the decision in *Peacock Buick*, 86 F.T.C. 1532, 1533–34 (1975), appear to require that consideration be given to the testimony of Mr. Clifford and Ms. Fraser, notwithstanding Sears' failure to make any reference to this testimony in its Special Report provided to the Commission in 1975.

87. James H. Clifford has been Sears' national buyer of dishwash-

ers since April 1972 (Clifford, Tr. 4789). From 1972 through 1974, his offices were located across the street from the Sears Home Economics laboratory which evaluated various appliances sold by Sears (Clifford, Tr. 4818–19, 4821–24). Mr. Clifford frequently visited the laboratory, as often as two or three times per week (Clifford, Tr. 4820–21, 5058). This facility included a kitchen where various small kitchen appliances were tested (Clifford, Tr. 4822–24). The kitchen was equipped with a 1972 Lady Kenmore dishwasher for washing, cooking and eating utensils which had been used for various purposes (Clifford, Tr. 4822, 4825–27). However, the kitchen did not conduct any testing as such of Sears' dishwashers (Clifford, Tr. 4821–22, 4825, 5013–14). Mr. Clifford had the practice of "dropping in" on this facility from time-to-time, often during his lunch hour or at "cookie time" when he would have a bite to eat and visit with the personnel (Clifford, Tr. 4820, 4826–28). During these informal and unplanned visits he occasionally observed the Lady Kenmore dishwasher in use (Clifford, Tr. 4826). Among the types of foods which Mr. Clifford recounted seeing prepared in the Home Economics kitchen were roasts, chicken, casseroles, spaghetti, cookies, cakes, pies and sauces (Clifford, Tr. 4828). Mr. Clifford testified (Tr. 4826):

> Q. Were you familiar with the – this is now during the period of 1972 through 1974, were you familiar with the dishwasher that was installed in the home ec kitchen?
>
> A. I was familiar to the point in seeing [it] in action. As I mentioned [34]earlier, I believe in stopping over to the home ec into the laboratory, the home ec kitchen was about two doors down from the young lady that was doing our dishwashers all the time.
>
> And usually, being kind of nosey, I would go over there with her and/or she might even be in the other room working with the other girls for some reason, and I would at that time usually coming back from lunch or going to lunch occasionally we sort of arrange to stop when they were taking something out of the oven to enjoy a little bit of their cooking, and then we would have a chance occasionally, if we were fortunate to be there right at the time they were loading the dishwasher or unloading the dishwasher, it gave us a little opportunity to sort of see in-home use and how the machine was performing.

According to Mr. Clifford, the personnel of the Home Economics kitchen were instructed not to pre-scrape or pre-rinse any dishes prior to washing them in the dishwasher and followed this instruction (Clifford, Tr. 4829–30). Mr. Clifford testified that on many of the foregoing occasions he observed the personnel in the Home Economics kitchen load soiled cooking and eating dishes into the Sears dishwasher and was thereafter present for the entire cycle of the dishwasher, observing the dishes as they were removed from the dishwasher (Clifford, Tr. 4830–31, 5059–60, 5077). On those occasions when Mr. Clifford had observed dishes and utensils after they had been washed in the Home Economics dishwasher, he examined the dishes and utensils and testified that he found them to be clean (Clifford, Tr. 4830-33, 5077-78). However, Mr. Clifford also conceded that he was only occasionally present during the entire period from the time the dishes were soiled and loaded into the dishwasher, until the dishwasher was emptied; sometimes he saw only a loading procedure, other times only an unloading procedure (Clifford, Tr. 4826, 4830, 5014-16, 5058-60). This undermines his prior testimony.

88. As the national buyer of dishwashers, Mr. Clifford reviewed and approved advertising claims for Sears' dishwashers. More specifically, he approved some of the advertising challenged by the complaint in this proceeding, including the no scraping, no pre-rinsing claim (Clifford, Tr. 4858-59, CX 1; Tr. 4869-70, CX 20; Tr. 4871, CX 22; Tr. 4875-76, CX 51). He testified that his approval of this advertising included the approval of statements that no pre-scraping or pre-rinsing was necessary (Clifford, Tr. 4859, 4867, CX 1; Tr. 4870, CX 20; Tr. 4871-72, CX 22; Tr. 4876, CX 51). The [35]basis on which he approved these statements was his observation of the use of the dishwasher in Sears' Home Economics kitchen (Clifford, Tr. 4859, 4868, 4870-70A, CX 20; Tr. 4872, 4876, CX 51).

89. Mr. Clifford's testimony was unsupported by any records, documents or other objective verification. Mr. Clifford's testimony simply amounts to undocumented assertions that the Sears' Lady Kenmore will perform as the Sears' advertisements represented. It is impossible to determine from Mr. Clifford's testimony significant details concerning the food soils left on the dishes, the conditions of washing, or other material aspects surrounding his view of the dishwasher in operation. He enumerated a number of foods prepared in the home economics laboratory but his recital was general (Clifford, Tr. 4828). It is impossible to evaluate the nature of the food soils on the cooking and eating dishes washed in the dishwasher. Based upon Mr. Clifford's enumeration (Tr. 4828), however, it is evident that these food soils and cooking procedures were not representative of the universe of food soils and cooking procedures encountered "normally and expectably" by the nation's public in household cooking. This is of fundamental importance and, by itself, renders the testimony of Mr. Clifford of no probative value as support for the unlimited claim of Sears that dishes, pots and pans washed in the Lady Kenmore required no pre-scraping or pre-rinsing. Furthermore, Mr. Clifford not only is a Sears employee but he was the Sears' offical responsible for procurement of dishwashers for Sears, including the Lady Kenmore, and approved the claim challenged in this proceeding. Taking into consideration all the

circumstances surrounding Mr. Clifford's testimony, the undersigned finds it self-serving, unreliable and unworthy of serious consideration.

90. The law judge finds that Mr. Clifford's testimony does not substantiate or establish that Sears had a reasonable basis for the representations in its advertising, described earlier herein and challenged in the complaint, that the Lady Kenmore will "completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers."

91. The factors bearing upon the testimony of Ms. Barbara Fraser are similar in many respects to those relating to the testimony of James H. Clifford. Ms. Fraser has been employed by D&M since 1969, first as a lab technician and later on as an engineer (Fraser, Tr. 5080). She has been involved in the testing of Sears' dishwashers as to their cleaning ability, testing of Sears' competitors' dishwashers, designing tests, doing research on wash systems and designing dishwasher cycles (Fraser, Tr. 5080–83, 5113). Although no records were kept, Ms. Fraser testified that in August 1972 a D&M employee under her supervision undertook a project to prepare baked-on and difficult to remove food soils to use in dishwasher testing, and to compare the performance of different brands of dishwashers (Fraser, Tr. 5084–90, 5092–96). The technician prepared various foods, including macaroni and cheese, canned pork and beans, [36]packaged cake mix, and different styles of eggs and omelets (Fraser, Tr. 5092–93, 5101–03, 5115). After the foods were cooked, they were removed from their containers by scooping out the center so as to leave an adhered coating on all of the dishes and were subsequently allowed to counterage for "one to two" hours (Fraser, Tr. 5103–04). The soiled cooking and eating dishes were washed in a "middle-of-the-line" Sears Kenmore dishwasher manufactured by D&M with cleaning capability identical to the 1972 Lady Kenmore (Fraser, Tr. 5096–98, 5161–62). Ms. Fraser testified that this machine was used rather than the Lady Kenmore model because the former had knobs by which the cycles could be controlled manually while the Lady Kenmore had pushbuttons which were inconvenient for testing purposes (Fraser, Tr. 5098–99, 5161–62). According to Ms. Fraser, dishes were not scraped, rinsed or soaked prior to washing (Fraser, Tr. 5104). The soiled dishes were washed on the dishwasher's "normal" cycle (Tr. 5097–5100, 5104), which was equivalent to the "power wash" cycle on the 1972 Lady Kenmore (Fraser, Tr. 5250).

92. Ms. Fraser testified that in all instances the dishes came out of the Sears' dishwasher clean (Fraser, Tr. 5094, 5105–07, 5183). As a result, Ms. Fraser testified that she concluded that the dishwasher

made by D&M for Sears would remove baked-on food soil without pre-scraping or pre-rinsing (Tr. 5188).

93. Following the August 1972 tests, Ms. Fraser testified that experimentation continued with different food soils to find a soil which would adhere well enough for use as a soil to test dishwashers and to compare different dishwashers (Fraser, Tr. 5094, 5108–09). This time a record was kept which is in evidence in this proceeding as CX 90, already discussed. According to Ms. Fraser, most of the food soils recorded in CX 90 were not prepared "the way that they would normally be prepared" (Tr. 5109). This has been discussed earlier in this decision. In connection with this testimony, it is necessary to state that Ms. Fraser is an engineer and not an expert on the manner in which the public prepares food "normally" if, indeed, there exists such an expert (see Tr. 5110–12). In testifying whether or not the food soils described in CX 90 were "normal" or "abnormal," the testimony of Ms. Fraser is simply that of [37]a lay person who has done some cooking.[1a] As stated earlier, the public prepares food in myriad ways, all of which fall into the category of the complaint, "cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers," excluding only kitchen disasters where, for example, cooking food is forgotten on the stove or in the oven.

94. According to Ms. Fraser, the tests reflected in CX 90 together with the unrecorded August 1972 tests caused her to have the opinion that "the Lady Kenmore 1972 dishwasher will remove normally prepared baked-on soils, normal recipes without pre-scraping or pre-rinsing" (Fraser, Tr. 5188; see also, RPF 19–22, 24–25).

95. The foregoing testimony, limited by Ms. Fraser's mental reservation to what she considered "normally prepared" soils and "normal" recipes, does not literally support the unqualified Sears' no scraping, no pre-rinsing claim. Beyond that, as in the case of Mr. Clifford, Ms. Fraser's testimony recounting the August tests is unsupported by any records, documents or other objective verification (Fraser, Tr. 5304). No records were made of these tests because,

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[1a] During the examination of another Sears' witness, Ms. Shari Bryant, counsel for Sears attempted to elicit testimony that the food soils reported in CX 90 were not "normal." Inasmuch as Sears counsel had not given notice to complaint counsel that Ms. Bryant would be questioned on this important point, as required by pretrial orders even as late as the day before her testimony, and complaint counsel had good reason to assume, based upon Ms. Bryant's pretrial deposition taken much earlier, that she had no knowledge of CX 90 and had never seen or reviewed CX 90, the law judge sustained complaint counsel's objection and refused to allow Sears' counsel to question Ms. Bryant on the point (Tr. 4294–4306). The ruling was grounded by the law judge on his authority to control the proceeding and to prevent prejudice as well as unfair surprise. Sears' counsel had more than ample oppertunity prior to the appearance of Ms. Bryant to give notice that the area of her questioning would include whether the food soils reported in CX 90 were "normal" or "abnormal." Counsel did not do so. In the opinion of the law judge, Ms. Bryant's expertise, however, did not in any event encompass expertise which would have qualified her to render opinion on the issue of whether or not the food soils reported in CX 90 were representative of the universe of food soils "normally and expectably encountered by consumers" in their kitchens.

according to the testimony of Ms. Fraser, "[i]n preliminary testing, or testing of casual nature, it is very common not to record proceedings that lead up into something else" (Fraser, Tr. 5092, 5095-96, 5100-5100A). Thus, the only record evidence of these "tests" is contained in Barbara Fraser's testimony. However, at one point in her testimony, when asked to recall certain specifics, she stated: "It's very hard to remember when things are unrecorded just what you did do" (Fraser, Tr. 5102). Her testimony considered most expansively, like Mr. Clifford's, is simply a series of unsupported assertions. The loading and washing conditions of the Sears' dishwasher are unknown, although there are indications that a full [38]dishwasher load was not used, and possibly only the few dishes soiled in the cooking experiments were washed (Fraser, Tr. 5314). Nothing permits a judgment as to whether the food soils were representative to any degree of the universe of food soils encountered "normally and expectably" by the public in cooking. As in the case of Mr. Clifford's testimony, this deficiency by itself, removes any probative value from Ms. Fraser's testimony as substantiation for Sears' unlimited claim or to show that Sears had a reasonable basis for the claim at its dissemination, as charged in the complaint.

96. The experiments or tests reported in CX 90 have already been discussed extensively. Sears states in its proposed findings that: "In several instances, food soils used in the tests reflected in the notebook (CX 90) were prepared according to normal consumer procedures. In these instances, all of the food soil was removed during the dishwashing process" (RPF 25). Sears claims that these results support Ms. Fraser's testimony that "the Lady Kenmore 1972 dishwasher will remove normally prepared baked-on soils, normal recipes without prescraping or pre-rinsing." As discussed in detail in earlier findings, the law judge rejects the contention that the food soils reported in CX 90 were not within the category of food soils "according to normal consumer recipes and normally and expectably encountered by consumers" in household cooking. However, it is not necessary to ground the conclusion that CX 90 fails to support Ms. Fraser's testimony on this basis. The food soils Sears claims were prepared according to "normal" recipes and procedures were few, cake, scalloped potatoes and beans (RPF 25), and there is no basis for believing that these food soils are representative of the universe of food soils encompassed by Sears' unqualified claim. The fact that CX 90 reports that the Sears' dishwasher washed a few soils clean from the dishes used in those tests neither supports Ms. Fraser's opinion nor substantiates Sears' claim nor provides a reasonable basis for it.

97. Taking into consideration all the circumstances surrounding Ms. Fraser's testimony, the undersigned finds it essentially self-

serving and unreliable, as that of Mr. Clifford. In connection with her testimony, it should be noted further that the Sears' no scraping, no pre-rinsing representation was being disseminated in early 1972, well prior to the August 1972 tests. See CX 2, and CX 72 which show dissemination of the advertisement, "What dishwasher would dare load these messy dishes without scraping or prerinsing," in the "Spring-Summer" 1972 issue of "Better Homes and Gardens Building Ideas". The August 1972 tests relied on by Ms. Fraser obviously cannot substantiate or provide a reasonable basis for claims made before the tests were conducted.

98. At the time Sears made the representation in its nationwide advertising that the Sears' dishwasher would "completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers," Sears did not possess and rely [39]on a reasonable basis.

C. Sears' Representation That Its Dishwasher Will Completely Remove, Without Prior Rinsing or Scraping, All Residue from Dishes, Pots and Pans Normally and Expectably Encountered by Consumers Is Not True, and the Advertising Containing That Representation Was Unfair, False and Deceptive.

99. As the preceding findings demonstrate, neither the 6(b) materials submitted by Sears nor the testimony of Mr. Clifford or Ms. Fraser, whether considered separately or overall, establish the truth of Sears' representation that the Sears' dishwasher will "completely remove, without prior rinsing or scraping, all residue and film from all dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers."

100. Indeed, the 6(b) materials submitted by Sears, and analyzed in the preceding findings, establish beyond question that food soils prepared "according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers" were not completely removed by the Sears' dishwasher. These 6(b) materials, submitted by Sears, in themselves establish that the no scraping, no pre-rinsing representation was false and untrue. There is, however, additional evidence that the claim was false and untrue which is set out in the following findings.

1. Opinion

101. Complaint counsel called an expert, Mr. Anthony Eberwein, to testify with respect to the no scraping, no pre-rinsing representation in Sears' advertising. His qualifications are set out in the Appendix at the end of this decision. Mr. Eberwein is an expert in dishwasher performance. After many years of service as a specialist in the technology of dishwashers and their performance with General Electric, Mr. Eberwein now maintains his own household appliance installation business (Eberwein, Tr. 950). Mr. Eberwein is familiar with a variety of household dishwashers, including those of Sears (Eberwein, Tr. 952–53).

102. Before he left General Electric, Mr. Eberwein tested Sears' dishwashers, including the Lady Kenmore, during the period 1972 through 1975 (Eberwein, Tr. 1096–97). He specifically tested Sears models marketed in those years with respect to cooked-on or baked-on soils, including macaroni and cheese, eggs, baked beans, sausage, hamburger, and other adhered food soils (Eberwein, Tr. 1100–01). He ran a minimum of eight wash tests, including replications (Eberwein, Tr. 1102). He found that the Lady Kenmore did not completely clean the dishes, pots and pans (Eberwein, Tr. 1102). Mr. Eberwein [40] testified that if all dishwashers were categorized from A to C with respect to cleaning performance, with A indicating the best washing performance, the Sears Lady Kenmore "would fall under C category" (Eberwein, Tr. 1102–03). In fact, the Lady Kenmore never cleaned all of the baked-on food soils completely clean (Eberwein, Tr. 1104). The fact that for tests of dishwasher performance Mr. Eberwein did not want a test where the dishes would always come out 100% clean does not detract from the significance of his testimony that, in testing the Lady Kenmore, "there was never total 100% soil removal." (see RRB, p. 14; Eberwein, Tr. 1104).

103. Mr. Eberwein testified that gross food soil must be removed from any dish, pot or pan before placing it in a household dishwasher (Eberwein, Tr. 1131). A dishwasher is not a garbage disposer and cannot be treated as such because the pump openings, pump mechanism, and water jets and other operating parts can become clogged from trapped food soils (Eberwein, Tr. 1130–31).

104. Mr. Eberwein testified more broadly that it would be impossible for Sears to test the cleaning ability of a dishwasher for all types of foods and cookware because of the many types of foods and methods of preparation (Eberwein, Tr. 980). Moreover, as described earlier, he stated that there are numerous variables which can affect dishwasher performance, such as the water temperature, water hardness, type of

food, manner of preparation, counteraging, etc. Even the size and shape of the pan to be washed can affect cleaning performance because size and shape affect whether the item can be placed in the dishwasher in a good cleaning position (Eberwein, Tr. 1019). In sum, based upon years of experience studying and testing household dishwashers and their cleaning ability, including specific tests of the Sears Lady Kenmore dishwasher of the type involved in this proceeding, Mr. Eberwein's expert opinion was that pre-treatment of dishes was frequently necessary to obtain optimum cleaning performance from the Sears' Lady Kenmore and other Kenmore dishwashers (Eberwein, Tr. 1132).

105. A former Sears' employee, Judith W. Cannon, who worked as a home economist for Sears from January 1970 through November 1974, and while in that position tested Sears' dishwashers, was subpoenaed by Commission attorneys (Cannon, Tr. 2412–13, 2417). Ms. Cannon was responsible from September 1972 through November 1974 for testing the cleaning performance of Sears' dishwashers and competitive machines (Cannon, Tr. 2412–17, 2430–37, 2443–44). Ms. Cannon has a Masters degree in Home Economics and ten years experience in the evaluation of household appliances, including dishwashing machines (CX 291A). Ms. Cannon's responsibilities at Sears included performance evaluation of home appliances and development and improvement of such appliances (CX 291A). During 1972–1974, Ms. Cannon spent approximately seventy percent of her time testing dishwashers, including testing the cleaning performance of the Lady Kenmore and other Sears' models (Cannon, Tr. 2445–47).

106. Part of Ms. Cannon's duties at Sears included review of [41] Sears' TV advertisements for dishwashers prior to their filming and dissemination (Cannon, Tr. 2548–52; CX 132, 141F). Among the TV ads reviewed by Ms. Cannon while at Sears were two advertisements for dishwashers entitled "Vicious Circle" (CX 8) and "Freedom Maker" (CX 9, 141; Cannon, Tr. 2554). In a memorandum to superiors at Sears, dated November 14, 1973, with respect to the claim in the TV commercial, "The Freedom Maker," "No need to scrape or rinse off stuck-on leftovers," later broadcast in major cities throughout the country (CX 9, 77), Ms. Cannon stated the contrary (CX 141A):

> . . . Baked or burned-on soil (cooking utensils: casseroles, pans, etc.) usually requires some additional effort for complete removal in a dishwasher.

107. While testifying, Ms. Cannon was shown CX 31, a 60-second Sears' radio commercial broadcast over local stations in August 1972 (CX 75) which made the representation:

> . . . You'll like the way it makes pre-rinsing and soaking of heavily soiled dishes, pots and pans a thing of the past.

Contrary to this representation, Ms. Cannon testified that it was necessary to pre-treat heavily soiled pots and pans before washing them in the dishwasher (Cannon, Tr. 2545–46).

108. Ms. Cannon was also shown CX 33, another 60–second Sears' radio commercial broadcast over local stations in September 1972 and July 1973 (CX 75), which made the claim:

> . . . Gets even the messiest baking dishes and roasting pans spotlessly clean . . . without prerinsing!

Ms. Cannon disagreed with this representation on the ground that it was untrue (Cannon, Tr. 2547).

109. Based on her experience testing Sears' and other dishwashers and her background as a home economist, Ms. Cannon testified that the Sears' Lady Kenmore will not completely remove, without scraping, pre-rinsing, pre-soaking or other pre-treatment, all food residue from all dishes, pots and pans, especially severely adhered soils such as baked-on or burned-on food residue (Cannon, Tr. 2545–48, 2555–58; CX 141A).

110. Complaint counsel called as an expert Mr. Frederick [42] Sullivan, who is a Senior Research Chemist and a Project Director at Arthur D. Little, Inc., an internationally known research firm (Sullivan, Tr. 1403–04). Mr. Sullivan has been with Arthur D. Little, Inc. for 31 years (Tr. 1403). Mr. Sullivan works in the Food and Agribusiness Section and supervises other professional employees (Sullivan, Tr. 1404, 1406). He has had experience with cleaning compounds and detergents and had conducted experiments with these cleaning agents and with dishwashers (CX 295A–B). His qualifications are set out in Appendix B. Mr. Sullivan testified that pre-treatment is necessary for stubborn baked-on food soils to be washed clean in a dishwasher (Sullivan, Tr. 1561–63, 1565). In fact, the manufacturer of Cascade Automatic Dishwasher Detergent recommends that utensils with tough baked-on food should be pre-soaked before washing in the dishwasher (CX 337A; Sullivan, Tr. 1561–62).

2. Sears Owners Manual

111. The Sears' Owner's Manual for the Kenmore line of dishwashers, including the Lady Kenmore, specifically instructs purchasers to pre-soak or "lightly" scour firmly cooked or baked-on foods before loading dishes in the dishwasher for washing (CX 99D, 100D). Sears contends that this instruction was an "error" and does not reflect the

cleaning ability of the 1972 Lady Kenmore (RPF 193–197; RRB, pp. 48–49). This contention is based on the testimony of Sears' national purchaser for dishwashers, Mr. Clifford, which has been found to be self-serving and unreliable. The contention is rejected. It is considered in subsequent findings and the discussion later in this decision.

3. Sears Internal Documents

112. CX 186 is a letter from Sears' Consumer Services Manager to a purchaser of a Sears dishwasher who had apparently complained about its cleaning performance. The letter is dated April 29, 1975, and the dishwasher in question was a "7200 line" dishwasher, the model involved in this proceeding, according to Ms. Cannon, who based her identification on the features described in the letter (Cannon, Tr. 2513–14). Sears' Consumer Services Manager included the following statement in his letter to the complaining purchaser "A light scouring may be necessary for satisfactory results" (CX 186). The argument that this statement of Sears' Consumer Services Manager should be disregarded because it may have been made to "placate the customer" by telling her "what she expected or wanted to hear" (RRB, p. 18) is frivolous and is rejected. Moreover, this statement is consistent with the Owner's Manual instructions provided to purchasers of Sears' dishwashers.

113. In June 1973, Sears' Merchandising Research Department prepared a report based on a survey of Sears dishwasher purchasers entitled, "Sears' Dishwasher Purchasers — Satisfaction and Usage [43] Survey" (CX 125). The purpose of the Survey was to acquire information from recent purchasers of Lady Kenmore dishwashers about their usage and degree of satisfaction with the machine in order that Sears might better evaluate alternatives for the development of its 1975–1976 dishwasher line (CX 125C, 272A). Four-page questionnaires were mailed out March 1, 1973 to 800 recent purchasers of Lady Kenmore dishwashers. Each questionnaire was accompanied by a 25-cent piece as an incentive. Returns were obtained from 373 for a 47% rate of return (CX 125B–C, Z071, Z084, 272A).

114. Dr. Harold J. Kassarjian, Professor of Marketing at the University of California at Los Angeles (CX 294A), was called by complaint counsel and testified as an expert in this proceeding to interpret and evaluate the Sears' survey of dishwasher purchasers. Dr. Kassarjian's background is set out in Appendix B and his curriculum vitae is in the record as CX 294.

115. Dr. Kassarjian testified that the sample of 800 persons used in CX 125 was a good size and ensured a low probability of error (Dr.

Kassarjian, Tr. 1816–17). The survey sampled a good cross-section of American households; the geographical distribution of the questionnaires mailed out closely paralleled the geographical distribution of Sears' total dishwasher sales (CX 125C, Z061; Dr. Kassarjian, Tr. 1815). The 47% rate of return was very high since a mail survey with a rate of return over 15% or 20% is a high return (Dr. Kassarjian, Tr. 1815–16). The high rate of return was due, in Dr. Kassarjian's opinion, to the 25¢ incentive mailed with the questionnaire and to the fact that those surveyed were recent purchasers of Sears' Lady Kenmore dishwashers who would likely want to talk about their new acquisition (Dr. Kassarjian, Tr. 1816). In Dr. Kassarjian's opinion, the findings of Sears' survey could be projected beyond the actual sample used. If other surveys of Sears' Lady Kenmore purchasers were done, he would expect approximately the same results (Dr. Kassarjian, Tr. 1845–46). In sum, Dr. Kassarjian believed the survey was well done (Dr. Kassarjian, Tr. 1844).

116. Survey respondents were asked a series of questions concerning their satisfaction with their Sears dishwasher (CX 125Z084–Z092). Of the Sears' dishwasher owners responding to the survey, 58% were "completely satisfied" and 38% were "mostly satisfied" with their units (CX 125Z049). However, in answering question 7 of the survey, respondents were able to indicate their specific degree of satisfaction on a scale of one to seven, from completely agreeing with a particular statement to completely disagreeing (CX 125Z088). The statements put to respondents in question 7 that are relevant to this proceeding were "gets dishes as clean as I would like them," "does not require prerinsing of dishes," and "washes pots and pans thoroughly" (CX 125Z088). The responses in the survey to these statements were as follows: [44]

		Gets Dishes As Clean As I Would Like Them	Does Not Require Pre-rinsing	Washes Pots and Pans Thoroughly
Agree Completely	7	60%	49%	27%
	6	17%	14%	13%
	5	5%	10%	16%
	4	7%	6%	14%
	3	3%	5%	8%
	2	2%	3%	5%
Disagree Completely	1	5%	11%	13%
No Answer Analyzed		1%	2%	3%

Respondents	378 100%	378 100%	378 100%

(CX 125Z028–Z030).

Significantly, only 27% of the respondents agreed completely with the statement in question 7 that the dishwasher "washes pots and pans thoroughly" (CX 125D, Z030), and 13% disagreed completely with this statement (CX 125Z030). No other statement in question 7 evoked more disagreement (CX 125Z024). In fact, in its "Summary of Findings," the survey itself reported, "Only 27% agreed completely with the statement that the dishwasher 'washes pots and pans thoroughly'. . ." (CX 125D). Over half of recent purchasers refused to agree completely with the statement, "does not require prerinsing of dishes" (CX 125Z029). It is evident from this that a very substantial percentage of purchasers answering the survey found that the dishwasher did not always get pots and pans clean without scraping, pre-rinsing or other treatment. Obviously, if purchasers found that dishes were not always clean after washing in the Lady Kenmore, pre-scraping, pre-rinsing or other pre-treatment would be necessary for the dishes to emerge clean. The survey itself stated, under "Conclusions," that "there are indications of some dissatisfaction . . . with cleaning, particularly of pots and pans" (CX 125F).

117. The survey questionnaire included several open-ended questions which required respondents to write in a response. Typically, the response rate for open-ended questions is much lower than for closed-ended questions where the respondent need only check off the response (Dr. Kassarjian, Tr. 1821–22). One of the open-ended questions asked if the purchaser had experienced problems with the new dishwasher (CX 125Z090). About 27%, or 100 indicated that they had experienced problems. Only these 100 customers were asked by the questionnaire to go on and specify the nature of the problem [45](CX 125Z090).

118. Among the responses to the question eliciting customer problems were the following (CX 125Z062–067):

0003 – It doesn't always clean dishes as thoroughly as I expected it to.

0028 – Didn't wash dishes well. Left egg, spaghetti sauce on plates and silverware; and film on glasses. . . .

0069 – Glasses on top rack do not come clean.

0098 – Glasses are milky. Dishes are not clean sometimes.

0208 – The top rack of dishes doesn't come clean as they should. Have lots of trouble with glasses filling up with particles of food and then drying on.

0209 – It does not operate well . . . pots and pans do not come clean. The dishes spot and sometimes come out dirty.

0253 – Soft food particles were left on top of glasses. I was under the impression no preparation of dishes would be necessary with sani wash and had to change detergents.

0262 – Leaving food particles on dishes.

0267 – Cottage cheese/tomato juice does not wash off plus others. . . .

0364 – Some food sticks to glassware. Glassware and silverware "spot."

0366 – Can not get dishes clean enough. . . . [46]

In Dr. Kassarjian's opinion, these responses were very significant because the surveyed person had to go to the trouble of actually writing out the response (Dr. Kassarjian, Tr. 1821–22).

119. In Dr. Kassarjian's opinion, the Sears' survey provided strong evidence that a substantial proportion of purchasers of the Sears' Lady Kenmore found the no scraping, no pre-rinsing representations to be untrue (Dr. Kassarjian, Tr. 1831–33). As to the conclusion to be drawn from the survey, overall, Dr. Kassarjian testified (Dr. Kassarjian, Tr. 1842):

> . . . Well, let's summarize it. What do consumers say, and what comes out of this study is that basically, you must prerinse and prescrape at least some dishes. And the pots and pans are not always thoroughly cleaned . . .

120. The Sears' survey of Lady Kenmore dishwasher purchasers established that a substantial number of purchasers had cleaning problems with the dishwasher, especially as to washing of pots and pans. The survey shows that such purchasers had found from actual use in their kitchens that the Sears' dishwasher would not completely remove, without prior rinsing or scraping, all residue and film "normally and expectably encountered by consumers" from dishes, pots and pans. Sears' contention that the survey should not be given any weight because "there was no way to determine whether the dishwasher owners responding to the survey had properly used the machine" (RRB, p. 21) is without merit. Although this argument might

be true if only a few purchasers had responded, the large number of those responding eliminates doubt that the survey was valid. The negative responses obtained by the Sears' survey from recent purchasers concerning the cleaning performance of new Lady Kenmore dishwashers are particularly significant, according to Dr. Kassarjian, because of what he terms "cognitive dissonance" (Dr. Kassarjian, Tr. 1822-24). Dr. Kassarjian defined this as meaning that "when someone owns something new, it's very, very difficult to see something negative about it" (Dr. Kassarjian, Tr. 1822). Thus, the degree of negative responses that came through is impressive in light of the consumer's propensity to see only the positive in the product purchased.

121. Sears published many of its advertisements making the no scraping, no prerinsing representation subsequent to June 1973 (CX 1 and 73; CX 2 and 72; 73; CX 4 and 64A-C; CX 5 and 65), the date of the Sears internal report on its survey of Lady Kenmore dishwasher purchasers. The survey results are evidence from actual consumer usage that the Sears' no scraping, no prerinsing claim was not true. Furthermore, the survey establishes, furthermore, that, as of June 1973, Sears had reason to know that the broad no scraping, no [47] prerinsing claim it was disseminating nationwide for its Lady Kenmore dishwasher was not true. Notwithstanding, Sears continued to disseminate this untrue representation by television, radio, magazine and print advertisements.

4. The IIT Tests

122. During pretrial proceedings, in April 1978, Sears engaged personnel at the Illinois Institute of Technology (IIT) in Chicago to conduct a series of tests of the Lady Kenmore dishwasher under conditions of "normal consumer usage" for use in this litigation (Dr. Norman, Tr. 3189a-91). To evaluate its cleaning ability Dr. Renny Norman, Engineering Advisor at IIT, directed the tests (RX 99, p. 3). He was fully informed that the tests were being conducted for litigation purposes and that Sears' advertising claims of no prescraping and pre-rinsing were at issue (Dr. Norman, Tr. 3191-92). Dr. Norman was assisted by Ms. Shari Bryant, a home economist (Dr. Norman, Tr. 3193-94). Both Dr. Norman's and Ms. Bryant's qualifications are set forth in Appendix B. The IIT tests were conducted as follows: two loads in April 1978; two loads in June 1978; and one load in July 1978 (Norman, Tr. 3200, 3211-12, 3217, 3226, 3269; RX 99, 173). For the two dishwasher loads in April, May and June, one load was done using the normal cycle and the other using the power wash cycle; the normal cycle loads were referred to as May Load 1 and June Load

1, respectively, and the power wash cycle loads were referred to as May Load 2 and June Load 2 respectively (Bryant, Tr. 4084; CX 354D; RX 99, p. 15). The one test load in July was done using the power wash cycle (Bryant, Tr. 4212).

123. Sears provided a 1971 model dishwasher to IIT for the April test; this dishwasher did not have a serial number or a nameplate on it (Dr. Norman, Tr. 3200, 3218, 3651). Two identical model 1973 Lady Kenmore dishwashers, one of which was new, were supplied by Sears to IIT for the May, June and July tests (Dr. Norman, Tr. 3218–19; RX 99, p. 4, 173, p. 1).

124. According to Dr. Norman and Ms. Bryant, the purpose of the April test was to conduct a dry-run in order to become familiar with all of the test procedures as well as to determine that everything was working properly (Dr. Norman, Tr. 3204–06, 3209–10; Bryant, Tr. 4078–79). No report was prepared on the April test (Dr. Norman, Tr. 3209; Bryant, Tr. 4086). Although Polaroid photographs had been taken of the dishes in the test, both Dr. Norman and Ms. Bryant testified that the photographs were of poor quality and were discarded (Dr. Norman, Tr. 3210; Bryant, Tr. 4086). Dr. Norman testified that he and Ms. Bryant "didn't really evaluate the results [of the April test]." (Dr. Norman, Tr. 3209). Since the dishwasher used in the April test was not the correct year dishwasher involved in this proceeding and since the procedures followed in the April test and the results are fragmentary, at best, the April test carries no probative value as to the truth of Sears' cleaning performance claim. [48]

125. Photographs were taken of the dishes in the May, June and July tests at the various stages of the test procedure (May: Dr. Norman, Tr. 3219–22; CX 352A–V. June: RX 99, photographs 1–24; CX 360A–Y. July: RX 173, p. 6; RX 173, photographs 1–20). Photographs were taken of the two dishwashers, the pots and cooking utensils with the food contained in them for the June test and after the food had been removed, the dishes both after they had been initially soiled[2] and after the dinner plates had been resoiled (for the June test), the dishes after they had been loaded into the upper and lower racks of both dishwashers, and the dishes after they had been washed, both while still in the dishwasher and after being unloaded (May: Dr. Norman, Tr. 3225, 3230–31, 3235, 3239–41, 3245–48; June: Dr. Norman, Tr. 3294–95, 3301–02, 3311, 3323–35 and Bryant, Tr. 4123, 4127–28, 4131–35 and RX 99, p. 4, 16–17; July: Dr. Norman, Tr. 3485–87, 3489, 3492–98 and Bryant, Tr. 4213–15, 4217–24 and RX 173, pp. 5–6). All photographs

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[2] One of the dinner plates and both of the casseroles used in the July tests had minor flaws in their finish which the IIT testing group thought would appear as soil in the photographs. Therefore, diagrams and photographs of the items showing the location of the flaws were prepared prior to the application of any food soil (RX 173 - photos 18, 19, 20; Dr. Norman, Tr. 3496–99, 3879; Bryant, Tr. 4222–24; CX 368Z029, Z082, Z084).

taken during the May, June and July IIT tests were taken by a professional photographer, employed by IIT and working under Dr. Norman's direction (Dr. Norman, Tr. 3220). The same photographer was used in each of the tests (Dr. Norman, Tr. 3221, 3485). The photographs were printed by an independent photo processing service which had no knowledge of the test program; the photographs were not retouched in any way (RX 99, p. 5; Dr. Norman, Tr. 3221, 3485). The purpose of the photographs was to provide a record of the "before" and "after" condition of the dishes (Dr. Norman, Tr. 3221–22). After the dishes and utensils were inspected and photographed, they were immediately placed in plastic bags, labeled, sealed and stored; subsequently, they were brought to the hearings in this proceeding, where they were opened and inspected (May: Dr. Norman, Tr. 3219, 3241–43, 3245, 3248 and see BX 183, 184; June: Dr. Norman, Tr. 3311, 3902–08 and Bryant, Tr. 4127–28 and see RX 181, BX 185; July: Dr. Norman, Tr. 3519, 3902–08 and Bryant, Tr. 4220–21 and see RX 182).

126. During defense hearings, Sears offered in evidence only the test reports, photographs, and dishes of the June Load 2 test, and the dishes washed in the July load (June, RX 99; July, RX 173). Sears did not offer in evidence the results of June Load 1 or either May Load 1 or May Load 2. At the suggestion of complaint counsel, in order that the record contain the complete series of tests run at IIT, the law judge received on his own initiative the dishes from June Load 1 (BX 185) and the dishes from both May Load 1 and May Load 2 tests (BX 183, 184).

127. Because the Sears' IIT tests conducted during the course of this litigation are obviously subsequent to the dissemination of the advertisements featuring the no scraping, no pre-rinsing [49]representation (CX 62–77), the tests can have no bearing on the "reasonable basis" issues raised in Paragraphs 11 and 14 of the complaint. The Sears tests conducted by IIT can only bear on the truth or falsity of Sears no scraping, no pre-rinsing claim (Tr. 4766–67).

128. The test conducted on May 8 and 9, 1978, followed procedures set out in a dishwasher performance test protocol promulgated by the Association of Home Appliance Manufacturers ("AHAM") (CX 355A, K, L, M, P, CX 185I, J, K; Dr. Norman, Tr. 3218). The food soils used in the May test loads were: spaghetti sauce, scrambled eggs, cream-style corn, hamburger patties, mashed potatoes, oatmeal, scalloped potatoes, yellow cake, sirloin tip roast, macaroni and cheese, mustard, blueberry pie filling, molasses, peanut butter, jelly, coffee, tea, milk, tomato juice, egg, butter, spinach and Wheatena (CX 355C, H, J). The dishload consisted of various aluminum and stainless steel utensils, Corning and Pyrex casserole dishes, Corning Corelleware dishes, stainless steel

flatware and assorted glassware (CX 355C, H, J). Although these food soils may appear extensive on a superficial examination, thoughtful analysis discloses that a number of them may be prepared in a countless variety of ways, each of which may result in a different soil left for cleaning even though the same ingredient is used. Moreover, numerous other factors, such as cooking time, cooking temperatures, age of utensils, type of utensils, quality of ingredients, etc., may affect the adherence of the food soil. Thus, the food soils in the May IIT tests do not represent the universe of food soils encompassed by Sears' unlimited claim and described in the complaint as resulting from "cooking and baking according to normal consumer recipes and under the circumstances normally and expectably encountered by consumers."

129. After the foods were cooked, the dishes were soiled and allowed to counterage overnight. A similar procedure was followed for the utensils whereby the baked-on foods were left in the utensils overnight and were removed on the morning of the second day (Dr. Norman, Tr. 3224–25). Ms. Bryant generally followed the AHAM testing procedures regarding soil application (Dr. Norman, Tr. 3224; CX 355J).

130. There was no pre-treatment, *i.e.*, pre-rinsing, pre-soaking or scraping, of any of the dishes prior to washing (Dr. Norman, Tr. 3239). Cascade dishwashing detergent was placed in both machines pursuant to the instructions in the Owners Manual (Dr. Norman, Tr. 3255–56).

131. After the dishwashers were unloaded by Dr. Norman and Ms. Bryant, they made an inspection of the dishes and utensils and photographed them (Dr. Norman, Tr. 3241, 3248). No report was prepared on the May test (Dr. Norman, Tr. 3219).

132. On June 1 and 2, 1978, another test was conducted at IIT by Dr. Norman and Ms. Bryant (RX 99, p. 3). The purpose of the June test was to evaluate the dishwasher's cleaning capability using foods [50] prepared pursuant to "normal" consumer recipes and other "normal" consumer conditions (Dr. Norman, Tr. 3270; Bryant, Tr. 4110; RX 99, p. 3). RX 99 is the report prepared on the June test (Dr. Norman, Tr. 3269–70).

133. The foods and dishload used in the June test loads were virtually identical to those used in the May test (see F. 127; CX 355C, H, J; RX 99, pp. 5–6). The conclusion in F. 127 that the food soils in the May tests do not represent the universe of food soils encompassed by Sears' unlimited no scraping, no pre-rinsing claim and described in the complaint as resulting from "cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers" applies to the food soils used in the

June test. The foods were prepared by Ms. Bryant on June 1 (Dr. Norman, Tr. 3279). In preparing the foods, Ms. Bryant followed "normal" consumer recipes and procedures, including package directions where available (Dr. Norman, Tr. 3764; Bryant; Tr. 4110, 4112–14; RX 99–112).

134. In the June test, all the cooking and baking utensils, except for a cake pan, were counteraged overnight with the cooked food remaining in the utensils (Dr. Norman, Tr. 3809–11; Bryant, Tr. 4118; RX 99, pp. 6–11). On the next morning, June 2, at about 11:00 a.m., the cooked foods were removed from the utensils, according to the types of procedures that would "ordinarily" be used by consumers in serving such food and so that a typical amount of food residue remained in the utensils (Dr. Norman, Tr. 3866–67; RX 99, pp. 13, 15). After the foods had been removed, the utensils containing the food residue were allowed to counterage until they were loaded into the dishwasher at 2:20 p.m. and 3:58 p.m. the same day for Loads 1 and 2, respectively. The utensils were counteraged for 3 hours, 20 minutes for Load 1 and 4 hours, 38 minutes for Load 2 (RX 99, p. 16; Dr. Norman, Tr. 3289–90).

135. The dinner plates used in the June test were initially soiled by Ms. Bryant on June 1 with eggs, spinach, butter and Wheatena (Dr. Norman, Tr. 3279; Bryant, Tr. 4115). Dr. Norman testified that when he first saw the soiled plates on June 2, it was his opinion that the dishes should have been more heavily soiled (Dr. Norman, Tr. 3285–86, 3981). Subsequently, the dinner plates were washed and resoiled on June 2, applying a heavier amount of soil than had first been used (Dr. Norman, Tr. 3287; Bryant, Tr. 4115–17). After resoiling the plates, they were allowed to counterage for 3 hours, 50 minutes and 5 hours, 10 minutes for Loads 1 and 2 respectively, before being loaded for washing (Dr. Norman, Tr. 3287; RX 99, pp. 7, 9).

136. None of the items to be washed were pre-scraped, pre-rinsed, pre-soaked or pre-treated in any way (Dr. Norman, Tr. 3292; Bryant, Tr. 4124–25; RX 99, p. 15). The dishwasher was loaded according to the directions contained in the Owners Manual, with the dishes and utensils divided between Loads 1 and 2 so as to create two dishwasher loads (Dr. Norman, Tr. 3291–94; Bryant, Tr. 4124–25, 4560–61; RX 99, [51]p. 15). After the dishwasher was loaded, Ms. Bryant filled the two dispenser cups on the Load 1 dishwasher and the two cups in the Load 2 dishwasher with Cascade dishwashing detergent in accordance with the Owners Manual instructions (Bryant, Tr. 4491–92; RX 99, p. 15). At this point, Ms. Bryant put both dishwashers into operation (Dr. Norman, Tr. 3726; Bryant, Tr. 4126).

137. After the completion of the dishwashing cycle, the dishwasher was unloaded by Ms. Bryant and Dr. Norman who then inspected the

dishes and utensils for cleanliness (Dr. Norman, Tr. 3311; Bryant, Tr. 4127–28).

138. Another test was performed at IIT on July 27, 1978 (Dr. Norman, Tr. 3479, 3481). The purpose of the July test was to duplicate a test procedure for the evaluation of dishwashers that was developed by Mr. Anthony Eberwein, a former employee of General Electric and one of complaint counsel's expert witnesses (Dr. Norman, Tr. 3479–80, 3484; Bryant, Tr. 4204; RX 173, p. 1). RX 173 is the report which Ms. Bryant prepared on the July test (Bryant, Tr. 4203–04).

139. Mr. Eberwein's test protocol is reflected in RX 174, pp. 31–64 (Bryant, Tr. 4204–06). The particular procedure used in the July test was Mr. Eberwein's type 8 test, which he designed in 1972 as a means to test a dishwasher's ability to remove baked-on foods (Bryant, Tr. 4204–06; Eberwein, Tr. 1232–34).

140. In conducting the July test, Ms. Bryant used the following food soils which were specified under Mr. Eberwein's type 8 test procedure: pork and beans, coffee, macaroni, oatmeal, evaporated milk, preserves, tomato sauce, beef gravy, beef ravioli, sugar, mustard, cheddar cheese, butter, homogenized milk, flour, salt and pepper (RX 173, p. 2, 174, p. 36). Mr. Eberwein's type 8 procedure permits the person conducting the test to choose between "Option (a)," in which a baked bean casserole and a macaroni and cheese casserole are used as baked-on soils, and "Option (b)," in which an oatmeal pan and an omelet fry pan are used for baked-on soils (RX 174, p. 59). In conducting the July test, Ms. Bryant chose "Option (a)," because the option included soils which had not been used in prior IIT tests (Bryant, Tr. 4206–07). The dishload consisted of assorted china, glassware, stainless steel flatware, and porcelain china casserole dishes (RX 173, p. 1, and pp. 34–35; Bryant, Tr. 4210–11).

141. In preparing and applying the food soils for the July test, Ms. Bryant followed the cooking prepartion and soiling procedures described by Mr. Eberwein in his type 8 test procedure (Compare RX 173, pp. 2–5 with RX 174, pp. 55–58). In Mr. Eberwein's type 8 test procedure, the cooking procedures contained in cookbook recipes that were used in preparing some of the foods were modified in order to "obtain more severe soil adhesion" (RX 174, pp. 56–58; Eberwein, Tr. 1230–31). Nonetheless, the food soils that were used in the July test are among those "normally and expectably encountered by [52]consumers." However, for the same reasons discussed in reference to the foods used in the May and June tests, the food soils used here do not represent the universe of food soils that was addressed by Sears in its unqualified claim.

142. Ms. Bryant departed from Mr. Eberwein's procedures in that

she did not remove excess food soils from the plates used in the test (Dr. Norman, Tr. 3483; Bryant, Tr. 4211). In Mr. Eberwein's opinion, the plates washed in the July test were in the condition they would have been had he prepared them under his protocol, except that excess food was not scraped off as his protocol recommended (Eberwein, Tr. 1246). The result of this departure from Mr. Eberwein's procedure was that the July test involved an excess amount of ravioli, beef gravy and tomato sauce on the plates and forks (Eberwein, Tr. 1246; Bryant, Tr. 4214; RX 173, p. 2). However, Sears' witness Dr. Norman admitted that the ravioli used in the July test was soft and moist to the point that it fell off the dishes as they were being loaded in the dishwasher; Dr. Norman testified that such food residue would not be adhered and would be relatively easy to remove in the dishwasher (Dr. Norman, Tr. 3899–3900).

143. After the food soils were prepared and applied, the baked-on soils were allowed to counterage for three hours and the other food soils for one hour, as specified in Mr. Eberwein's type 8 procedure (Compare RX 173, pp. 2–5; with RX 174, pp. 55–58).

144. The dishes were then loaded into the dishwasher according to the directions in the Sears' Owners Manual (Bryant, Tr. 4213; RX 173, p. 56; Eberwein, Tr. 1336–37). Ms. Bryant added detergent and started the machine (Bryant, Tr. 4217).

145. After the dishwasher was unloaded by Ms. Bryant, she and Dr. Norman inspected the utensils for cleanliness (Dr. Norman, Tr. 3519; Bryant, Tr. 4220).

146. Complaint counsel attack the IIT tests as unreliable and poorly conducted alleging many irregularities and defects. Complaint counsel contend that, far from supporting Sears' defense, the IIT tests are further evidence that the no scraping, no pre-rinsing claim is false.

147. The undersigned law judge finds that the IIT tests do not establish that the Sears' Lady Kenmore "will completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectedly encountered by consumers." Indeed, as complaint counsel contend, the IIT tests tend to show that the Sears Lady Kenmore will not perform as Sears told the public in its advertisements.

148. As described, Sears did not offer in evidence the results of all the IIT tests, but only the results of the June Load 2 test and the results of the July test. In other words, Sears relied on only [53]two test operations of its Lady Kenmore. The June Load 1 was not offered by Sears on the ground that the "power wash" cycle should have been used rather than the "normal wash" cycle, and the May tests were not

offered on the ground that the food soils, or at least some of them, did not reflect "normal consumer usage" (RRB, 23–29).

149. Operating the Lady Kenmore twice, which many consumers may do in a single day, with a consequent limited number of food soils, is grossly inadequate to support the truth of Sears' representation. As stated several times in this decision, cooking and eating dishes are soiled an enormous number of ways in daily cooking in the nation's households. Sears represented that its Lady Kenmore would wash all these myriad food soils, many severely stuck-on but nonetheless "normally and expectably encountered" in cooking, from all dishes, pots and pans without pre-treatment of any kind. There is no basis in the record to conclude that the food soils on the dishes, pots and pans washed in the June Load 2 and in the July single load tests were representative of the whole spectrum of food soils "normally and expectably encountered" in the public's kitchens. At the very least, Sears did not show this to be the case, if such a showing were even possible in view of the claim. The unlimited claim of Sears, in short, is not established by operating the dishwasher twice and washing a few food soils when there are thousands of food soils in the universe of food soils covered by the claim, unless those few food soils are shown to be representative of all the food soils "normally and expectably encountered" in the nation's households. Broad and unverified assertions by Ms. Bryant, the home economist who prepared the foods used in the IIT tests, or others, that the food soils were "representative" does not constitute such proof, and to the extent Sears contends that it does, that contention is rejected.

150. Although the Sears dishwasher was tested in May with two loads, one using "normal wash" and the other "power wash," Sears did not offer the results of either of these tests in evidence. Specifically, Sears contends "The May IIT tests do not reflect the dishwasher's ability to remove food soils prepared 'according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers,' as required under the terms of Paragraph 12 of the Complaint, since the AHAM procedures used in those tests do not in any way reflect normal consumer usage." (RRB, p. 24). In support of this claim, Sears relies on a memorandum from Ms. Bryant to Dr. Norman, dated June 19, 1978, and the testimony of Ms. Bryant in this proceeding. Ms. Bryant, as described, prepared the food soils used to soil the dishes and utensils used in all the IIT tests. Her memorandum to Dr. Norman makes the following statement (CX 355P):

> [I]t is my opinion that the AHAM food preparation standards (prepared by me on May 8) for egg, Wheatena and spinach are mixtures to be applied on plates and flatware for

testing not eating purposes. In fact none of the three [54]foods as they are suggested to be prepared provide the flavor and/or consistency of what the same foods would be if we served them to be eaten as a typical meal. The AHAM Wheatena recipe, for example, is not even what the package suggests.

While a witness in this proceeding, Ms. Bryant testified that the "AHAM" food soils used in the May IIT tests, *i.e.*, the Wheatena, eggs, and spinach, were "abnormal," stating "I just didn't think it was the way someone would do something in the home." (Bryant, Tr. 4384). The tenuous basis for Ms. Bryant's opinion that the food soils used in the May IIT tests were "abnormal," however, was brought out during complaint counsel's cross-examination of Ms. Bryant.

151. According to Ms. Bryant, the spinach used in the May tests was abnormal because, prior to being applied to the dishes, it was neither heated nor seasoned with salt, pepper, etc., as would happen in a normal consumer household (Bryant, Tr. 4385, 4405-06). The Wheatena was "abnormal" in Ms. Bryant's view because milk was used to prepare it rather than water (Bryant, Tr. 4406); however, she conceded on cross-examination that the Wheatena package states, "When preparing Wheatena, milk may be used in place of water." (Tr. 4408). The eggs used in May were "abnormal" according to Ms. Bryant because only the yolk was used as a test soil (Bryant, Tr. 4409). In answer to the question, "What was abnormal about the egg, Ms. Bryant," she testified, "Well, do you usually prepare eggs and just serve the yolk?" (Bryant, Tr. 4409). Ms. Bryant had "no idea" whether the abnormalities she detected in the AHAM food soils affected the adherence of those soils to dishes and utensils (Bryant, Tr. 4386).

152. The reasons for Ms. Bryant's opinion that the AHAM test soils used in the May IIT test of Sears' Lady Kenmore dishwasher were "abnormal" are insubstantial; indeed, they border on the frivolous. Sears' objection on this ground that the May tests are to be disregarded is without merit and is rejected.

153. The AHAM test protocol (CX 185) was designed "to establish a uniform and repeatable procedure or standard method for measuring specified product characteristics of dishwashers," and was "intended to provide a means by which different brands and models of dishwashers can be compared and evaluated with respect to characteristics of significance in the use of the product." (CX 185E). The AHAM test protocol is an industry standard. An examination of the food soils and food preparation procedures set out in the AHAM test protocol reveals nothing that appears to be extraordinary. Spinach, wheat cereal (Wheatena) made with skim milk, soft-boiled egg yolks, margarine, tomato juice and tea, are the test soils specified for use (CX 185H). Very explicit instructions are given for food soil preparation (CX

185H–K) to enable the protocol to be replicated with precision so that the test will be the same whoever uses it. There is nothing to suggest that the food soils are [55]unusually difficult to remove. Mr. Eberwein testified that the AHAM food soils were realistic (Eberwein, Tr. 1132–35). In fact, the AHAM test protocol, according to Mr. Eberwein, was not designed to test food soils which were difficult to remove such as "baked-on" or "cooked-on" foods, but rather, was designed "to test dishwasher performance in general, normal cycle, no pot and pan cycle" (Eberwein, Tr. 1135). Ms. Bryant, a Sears' witness, testified that the AHAM test protocol was "designed so that foods do remain on the plates" so that you can compare one dishwasher with another (Bryant, Tr. 4412). However, there is nothing in the AHAM test protocol to this effect. The Sears' unqualified, unlimited no scraping, no pre-rinsing claim plainly encompassed the food soils contained in the AHAM test protocol as did the complaint.

154. Load 1 of the May test and Load 1 of the June test both resulted in a number of still dirty dishes after washing in the Lady Kenmore (Dr. Norman, Tr. 3925–26, 3928–29, 3936–46; Bryant, Tr. 4627–29, 4633–36, 4638–43; BX 183, 185). Sears objects to consideration of these test loads on the ground that the "normal wash" cycle was used rather than the "power wash" cycle. During the investigation of this proceeding, Sears informed the Commission that the normal cycle was "substantially the same" as the power wash cycle (CX 85B). In its Special Report Sears stated that the phases and times of the normal cycle were the following (CX 83Z002):

First Wash: 8 minutes
First Rinse: 3-1/2 minutes
Second Rinse: 3-1/2 minutes
Second Wash: 8 minutes
Third Rinse: 4 minutes
Fourth Rinse: 5 minutes
Total Time: 32 minutes

In a letter to the Commission's staff thereafter, house counsel for Sears provided the phases and times of the power wash cycle as follows (CX 85B):

First Wash: 8 minutes
First Rinse: 3 minutes
Second Rinse: 4 minutes
Second Wash: 8 minutes
Third Rinse: 4 minutes [56]
Fourth Rinse: 5 minutes
Total Time: 32 minutes

Obviously, as Sears' house counsel indicated, the difference in the cleaning phase of the foregoing normal cycle and power wash cycle is insignificant. The Sears' Owners Manual, however, described the power wash cycle of the Lady Kenmore as having "2 extended washes" and lists the total time of the power wash cycle as 4 minutes longer than the total time of the normal cycle (CX 99G and 100G). Sears has also stated that the cleaning ability of the Kenmore dishwasher is the same as the Lady Kenmore. Sears' Kenmore dishwashers do not have the power wash cycle. In its proposed findings, Sears stated in comment on the testimony of Ms. Fraser relative to the alleged August 1972 tests at D&M which were done with a Kenmore dishwasher: "The dishwasher used in this testing was a middle-of-the-line 1972 Sears machine, mechanically equivalent to the 1972 Lady Kenmore . . . The cleaning capability of this dishwasher was identical to the 1972 Lady Kenmore" (RPF 15). Shortly following the preceding finding, Sears stated that in the August 1972 tests at D&M the dishes "were washed in the [Kenmore's] normal cycle, as was D&M's standard practice . . . This cycle was equivalent to the 'power wash' cycle on the 1972 Lady Kenmore" (RPF 18).

155. Sears did not resolve the ambiguity created by the information it gave the Commission in connection with its Special Report, CX 83Z002 and CX 85B, the statements in the Sears' Owners Manual, CX 99G and 100G, and the statements by Sears that the Kenmore dishwasher's normal cycle has the same cleaning capability as the Lady Kenmore. The ambiguity can be resolved by an inference that the normal wash cycle of the Lady Kenmore differs from the normal wash cycle of the Kenmore. That inference, however, may or may not be true. Further, IIT tests were conducted to validate the no scraping, no pre-rinsing claim, and counsel for Sears was closely involved. The IIT tests used the normal cycle as May Load 1 and June Load 1 demonstrate. The reason this was done, if only tests with the power wash are valid, has not been explained by Sears.

156. Sears advertised the no scraping, no pre-rinsing claim in connection with its Kenmore dishwashers having "normal wash" cycle, not merely its top of the line Lady Kenmore (see, *e.g.*, CX 6–8, 10). Significantly, Sears' no scraping, no pre-rinsing claim was not limited to the "power wash" cycle of the Lady Kenmore. Nothing in Sears' advertisements or in the Owners Manual stated, even indirectly, that neither scraping nor pre-rinsing was necessary, provided purchasers used "power wash." On the contrary, the claim was made in a blanket fashion by Sears for its dishwashers generally.

157. Sears has the burden of justifying its objection to consideration of the May Load 1 and June Load 1 tests, and it did not establish,

although Sears obviously has full information about its machines, that its objection was valid. Sears' contention that May Load 1 and June Load 1 should not be considered in judging the truth [57]of the no scraping, no pre-rinsing claim is rejected.

158. Some of the items washed in the June Load 2 test and the July single load, upon which Sears relies, were not washed clean, in any event. See as to June Load 2 the Pyrex baking dish and the aluminum roasting pan, and as to the July load two saucers, a bowl, a number of plates, knives, forks and spoons (RX 181 and 182). Results showing that some of the items emerged from the Lady Kenmore with food residue remaining on them (Dr. Norman, Tr. 3915–18, 3920–25, 3928–34; Bryant, Tr. 4615–25) clearly do not prove that Sears' no scraping, no pre-rinsing claim is true. The dishes from June Load 2 and the July single load are in the record for examination (RX 181, and 182). Some of them undeniably are not clean. A dish is not clean when it has food residue still remaining on it even if in the form of small specks or spots. Some of the dishes and silverware do have such food soil remaining on them, as stated.

159. Sears contends that the dirty dinner plates which emerged from the July IIT test should be disregarded in considering this test because photographs of the dishes after loading show one of the dinner plates — specifically, the second plate from the left in the rear section of the lower rack — was tipped over against the plate next to it in such a way as to block the spray of water to the face of the one plate and the reverse of the other (RX 173 - photos 2, 3, 4; Dr. Norman, Tr. 3488; Bryant, Tr. 4216–17). Both Dr. Norman and Ms. Bryant testified that the tipping of the plate was caused by moving the dishwasher, a portable model, after loading (Dr. Norman, Tr. 3487–88; Bryant, Tr. 4215–16). Photographs taken after the cycle was completed, but before the dishwasher was unloaded, show that these two plates remained in the same relative position during washing (RX 173 - photos 5, 6). Consequently, the face of one plate did not receive the full force of the water during the wash cycle and was not cleaned (Dr. Norman, Tr. 3493; Bryant, Tr. 4221; RX 173 - photo 13). The argument of Sears in this respect is without merit, and soiled plates resulting from tipping should not be ignored in considering the results of the July test. Tipping of dishes, or changes in the position of dishes and other items in the dishwasher, can occur very easily either when the racks are pushed in and the door closed or as a result of the agitation and impact of the water during washing action (Eberwein, Tr. 1337–38). Where a portable is used, the consumer plainly may move it to connect it to a water faucet (Dr. Norman, Tr. 3899). Sears' witness Dr. Norman acknowledged that such tipping would not be an extraordinary

occurrence in the consumer's use of a dishwasher (Dr. Norman, Tr. 3899). Dr. Norman also acknowledged that another plate in the same load was tipped; however, this plate was cleaned (Dr. Norman, Tr. 3897–98; RX 173 - photographs 4, 5, 6). Thus, these are completely normal circumstances and provide no basis for excluding from consideration the still-dirty dinner plates when evaluating the July test.

160. There is no valid reason for excluding the May Load 2 test from consideration on the issue of the truth of Sears' no scraping, no pre-rinsing representation. The fact is that a number of items [58] washed on the "power wash" cycle of the Lady Kenmore dishwasher emerged from the washing, like a number of July test load items, not clean (Dr. Norman, Tr. 3930–32, 3934; Bryant, Tr. 4630–32). See aluminum roasting pan, plates, Corningware casserole dish, forks, spoons and knives (BX 184). As stated with respect to the June Load 2 test and the July single load test, the claim that the Sears' no scraping, no pre-rinsing representation is true obviously cannot be established by a test in which a number of the items washed emerged dirty.

161. The IIT tests, as the foregoing findings show, not only failed to support the truth of Sears' no scraping, no pre-rinsing claim, but constitute evidence that it was false. Beyond that finding, it is found that there were substantial deficiencies both in the IIT tests themselves and in the evidence introduced by Sears to show the results of those tests.

162. Photographs are inadequate to establish that the cooking and eating dishes were washed clean of all residue and film by the dishwasher. It cannot be determined from an examination of photographs whether dishes, pots and pans are, in truth, clean. Although some photographs may be satisfactory for this purpose, others are not. For example, it cannot be determined from the photograph of two aluminum cooking utensils washed in the May Load 2 test whether or not they are clean of all residue and film (CX 352U). Furthermore, photographs are deficient as evidence that the dishes, pots and pans are clean because they do not show all surfaces; even in those instances where the cooking and eating surface is shown, Sears' photographs do not show the back or underside surface (CX 352B–V, 360B–Y; RX 99, photos 2–25, RX 173, photos 2–7, 9–20) upon which it is perfectly possible that "redeposited" soil may have been placed by the washing action of the dishwasher, resulting in a dish which is not clean. Witnesses testified in this proceeding that photographs have serious limitations as a means of determining whether dishes, pots and pans are clean (Eberwein, Tr. 991–92, 994; Ferguson, Tr. 1674–76; Annis, Tr. 2276–77). For instance, photographs do not always show grease, film or

gritty, but otherwise invisible, dirt and may exhibit distortion due to lighting (Ferguson, Tr. 1674, 1676; Annis, Tr. 2276). Mr. Eberwein testified that he was of the opinion that photographs were appropriate only to show the condition of dishes and utensils before being put into the dishwasher, *i.e.*, before and/or after soiling (Eberwein, Tr. 991–92). Ms. Annis, a household equipment professor at Kansas State University, testified that photographs alone are an inaccurate and unacceptable scoring system (Annis, Tr. 2276–77). The law judge observed during the course of the hearings in which the dishes used in the IIT tests were examined in the hearing room, that photographs do not accurately reflect the food soil left on the dishes and that the food residue became much more apparent in looking at the dishes themselves than in looking at the photographs (Tr. 4777).

163. The fact that photographs are inadequate as evidence to establish that cooking and eating dishes have been washed clean is [59] not corrected by the presence in this record of the cooking and eating dishes washed in the Sears' IIT tests. Food soil not removed from dishes and soil "redeposited" on dishes during the washing operation of the dishwasher, does not always remain permanently after the dishes have been removed from the dishwasher. The dishes used in the IIT tests, therefore, do not necessarily have the same amount of food residue on them as they did when they were first removed from the dishwasher in May, June and July of 1978 (Tr. 4777). In order to establish the condition of dishes after a test washing in a dishwasher, the dishes must be examined at the time they are removed from the dishwasher, and accurate records prepared at that time. Food soils not removed from cooking and eating dishes, and food soil "redeposited" during the dishwashing process, may dry up and flake off or fall off the dishes with the passage of time (Tr. 3937, 3940–41, 3948–49, 4633–34, 4637, 4640). In such instances, dishes which emerged from the dishwasher with food particles on them may appear clean after a period of time because the food particles have dried up and fallen off. Some of the plastic bags in which the dishes were stored had loose particles of food in them, thereby demonstrating that food residue had been knocked off or had fallen off the washed items before hearings in this proceeding began or during the course of the hearings (*e.g.*, Tr. 3527, 3937, 3940–41, 3949–50, 4633–34, 4637, 4640). The law judge, in fact, observed actual instances where food particles fell off the IIT test dishes during the hearings (Tr. 4777). In one instance, while respondent's counsel was handling a cup, the food residue was dumped out of the cup (Tr. 3949–50). Although some of the plastic bags had food residue in them, the food residue that fell off the stored dishes is not necessarily to be found in the plastic bags in which the dishes were

stored because there were examples at the hearings of plastic bags that had been turned inside out or had become torn (*e.g.*, Tr. 3352, 3360-61, 3371-73, 3436-38, 3440-41, 3539-40; 3542-43, 3554-55, 3557, 3560; Dr. Norman, Tr. 3948-49). Furthermore, the dishes were packed and repacked by Sears during this proceeding and were shown by Sears' counsel to witnesses during questioning. In such cases, the dishes had to be handled by counsel for both sides and were examined by the law judge. Dried food spots or particles inevitably could have become dislodged under the circumstances. The dishes, pots and pans washed in the IIT tests are clearly not in the same condition as they were when removed from the dishwashers. The dishes, as a consequence, are reliable evidence only to show the food soil *still* remaining on them. They are not reliable evidence that the Sears' dishwasher washed them clean of all food residue and film, and the law judge specifically so finds.

164. Beyond the foregoing, complaint counsel question the IIT tests because of the failure to use any systematic scoring procedure, because of the alleged involvement of Sears' counsel in the tests, and on the ground that a number of procedures were followed which would maximize the cleaning ability of the Sears' dishwasher (CPF 168-70, 183-92). In view of the findings herein that there are fundamental and fatal deficiences in the IIT tests as evidence that the Sears' dishwasher would perform as advertised because (1) the [60]food soils were not representative of the universe of food soils encompassed by the claim and the Commission's complaint, and (2) a number of the dishes came out of the dishwasher dirty, it is not necessary to evaluate in detail these other objections to the IIT tests. The following findings, nevertheless, are made.

165. Neither RX 99, the June test report, nor RX 173, the July test report, contained any scoring procedure to evaluate the cleanliness of the items washed (Dr. Norman, Tr. 3742). The May test also did not involve a scoring procedure (Dr. Norman, Tr. 3742). Instead, the test reports relied solely on the photographs to provide the results (RX 99, p. 18, 173, p. 6). A protocol for testing the cleaning ability of dishwashers should contain an objective procedure for scoring the dishes (Eberwein, Tr. 988-94, 1251-52; Sullivan, Tr. 1431; Annis, Tr. 2274-77). Dr. Norman, who conducted the IIT tests, conceded that it is not customary in scientific design and experimentation to use photographs alone to determine the results of a test (Dr. Norman, Tr. 3742-43. See also Fraser, Tr. 5273-74).

166. Sears' counsel was involved in the actual testing procedures more than seems proper for allegedly objective and important tests conducted by an academic institution (See, Dr. Norman, Tr. 3681-83,

3727–29). Sears' counsel directed the use of the AHAM test protocol in the May test (Dr. Norman, Tr. 3690; Bryant 4384), as well as the use of Mr. Eberwein's General Electric test protocol in July (Bryant, Tr. 4593). Sears' counsel furnished a list of foods (RX 179) from which foods to be used in the May and June IIT tests were selected (Dr. Norman, Tr. 3692–93; Bryant, Tr. 4398). Although all of these foods were not used, there were no food soils used in May or June that were not on RX 179 (Bryant, Tr. 4393, 4403). Counsel was also present at certain stages of the actual testing (Bryant, Tr. 4366, 4441–42, 4588–89) and participated in various operational details of the tests, such as determining the amount of food residue that would be applied to some of the dishes (Dr. Norman, Tr. 3704–05; Bryant, Tr. 4590–91), choosing a method of counteraging (CX 353E), determining the wash cycles to be used (Bryant, Tr. 4366), choosing the temperature setting on the hot water heater (Dr. Norman, Tr. 3647–48, Bryant, Tr. 4366–67) and suggesting the use of photographs as the major means of evaluating the test results (Dr. Norman, Tr. 3727).

167. Sears' counsel was involved in writing the test report which has been introduced as RX 99. Before the final report was prepared and subsequently, introduced into evidence, Dr. Norman submitted a draft report (CX 356) to the office of Sears' counsel, where certain revisions were discussed and made (Dr. Norman, Tr. 3827). Consequently, there are some substantive differences between the draft (CX 356) and the final report (RX 99). The draft stated: "The objective of the program was to evaluate the cleaning capability of the dishwasher under carefully controlled conditions. Cooking utensils, dishes, and silverware were to be soiled using normal cooking and baking procedures." (CX 356B–C). However, this was changed, based upon discussions with Sears' counsel (Dr. Norman, Tr. [61]3824) so that the final report stated: "The objective of the program to test the cleaning capabilities of the dishwasher in accordance with procedures which would ordinarily be used by a typical or average user of the dishwaser. Therefore, cooking utensils, dishes and silverware were to be soiled using normal cooking and baking procedures." (RX 99, p. 3).

168. The draft report of Dr. Norman did not contain any reference to the surface temperature of utensils, stating only that "an internal heater raised the rinse water temperature to 69°C (156.2°F)" (CX 356Z005). However, the final report referred to a surface temperature of utensils stating that the "69°C (156°F) water temperature result[ed] in a utensil surface temperature during this cycle of the same temperature" (RX 99, p. 16). Dr. Norman testified that the reference to utensil surface temperature was an assumption based on measurement of the temperature of the drain discharge water, and that there was

never any actual measurement of the surface temperature of the utensils (Dr. Norman, Tr. 3985–88). The additional language as to utensil surface temperature was added between the time the draft report was submitted to Sears' counsel and the completion of the final report (Dr. Norman, Tr. 3988). The involvement of Sears' counsel in the actual conduct of the IIT tests is a factor to consider in judging these tests.

169. A water softener was used in the IIT tests (Dr. Norman, Tr. 3796). Soft water does enhance the cleaning action of a dishwasher (Eberwein, Tr. 1035–37; Dr. Norman, Tr. 3796). Failure to mention in the test report (CX 99) that a water softener was used, however, is a questionable factor.

IV. Sears Did Not Have a Reasonable Basis for the Representation That Dishes in the Top Rack Will Get As Clean As Those in the Bottom Rack

170. Paragraph 13 of the complaint alleges that Sears' advertisements represented that dishes in the top rack of the dishwasher will get as clean as those on the bottom rack without prior rinsing or scraping. As has already been found, this representation was made by Sears. CX 1 specifically states:

> And the dishes on top get as clean as those on the bottom. Because every cup and glass is scoured inside and out by a field of eight upper jets.

See also CX 2.

171. Paragraph 14 of the complaint charges that when Sears made this representation, it had no reasonable basis for it and, therefore, the claim was deceptive and unfair. The complaint does not charge that the representation was false.

172. The upper rack on the Sears' dishwasher, which Sears advertises as the "Roto-Rack," is a circular rack which is designed [62] water pressure (CX 2, 277Z014, Z054; Fraser, Tr. 5240). Sears has promoted the Roto-Rack as an exclusive Sears feature, as an advantage over competitors' square racks and therefore, as another reason to purchase Sears' dishwashers. For instance, CX 3, a print advertisement stated:

> Lady Kenmore's upper rack is the revolutionary Roto-Rack. It holds as much glassware as square racks, yet has no 'dead corners'. And it revolves to make sure not a dish is missed.

See also CX 14B and CX 42.

173. In its 6(b) report, Sears did not submit any tests which compared the cleaning performance of the upper rack with the lower rack utilizing the same types of foods and dishes. Sears' witness Ms. Fraser could not identify any tests which were run specifically to compare the cleaning performance of the upper rack with the lower rack using the same types of food soils on the same dishes for each rack (Fraser, Tr. 5231–33). Mr. Clifford also could not identify any specific tests done by Sears or the maker of its dishwashers, D&M, that were run to compare the cleaning performance of the lower rack with the upper rack. He knew of no tests in which identically soiled utensils were placed in the upper and lower racks of Sears' dishwashers to compare cleaning performance (Clifford, Tr. 4995–96).

174. In defense on this aspect of the proceeding, Sears relies on the testimony of Ms. Fraser concerning her work at D&M on the testimony of Mr. Clifford and on the IIT tests conducted in 1978 which, Sears asserts, "verify the results observed by Ms. Fraser and Mr. Clifford" (RPF 73–77).

175. According to Ms. Fraser, in her August 1972 work at D&M, she examined dishes from both racks of the Lady Kenmore and found them equally clean (Fraser, Tr. 5183–85). In other tests, according to Ms. Fraser, the upper rack and lower rack scores were the same statistically (Fraser, Tr. 5184). As stated earlier, no record was made of the August 1972 tests; these oral assertions of Ms. Fraser are unverified and unsupported by any documentation. They amount simply to testimony with an interest in the outcome of this proceeding that the dishwasher manufactured by D&M for Sears would perform as Sears represented to the public. As already found, Ms. Fraser's testimony is unconvincing and unreliable as proof of such crucial facts. Furthermore, although Ms. Fraser testified in this proceeding that the washing performance in the upper rack and the lower rack were the same (Fraser, Tr. 5227), her testimony is contradicted by her own statement in a 1974 D&M test report submitted by Sears as part of its 6(b) documentation, where Ms. Fraser specifically stated with respect to the dishwashers manufactured for Sears that "the washing action is better in the lower rack." (CX [63]94B).[3] In still another report authored by Ms. Fraser in 1975 on "Sears Dishwashing Tests" the following conclusion, inconsistent with her testimony on this issue was stated (CX 280C):

> **RESULTS**
>
> Three tests were run at the D&M Test kitchen - one each of "B", "1", and "2". The dishes

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[3] Although this document does not specifically mention the Sears' dishwasher, it was submitted by Sears as substantiation material for claims made for its dishwashers in its 6(b) report.

> which were soiled with very adhesive soils - particularly egg and oatmeal, retained these soils. The silver with dried-on egg appeared as though it had not even been touched by any wash action. The oatmeal in the upper rack was as bad, *but the lower rack items that were soiled with oatmeal did not come out much cleaner*. (Emphasis added).

176. Similar considerations bear on Mr. Clifford's testimony also discussed earlier. According to Mr. Clifford, during his visits to the Home Economics kitchen of Sears, across the street from his office, sometimes made so as to be there "when they were taking something out of the oven to enjoy a little bit of their cooking" (Clifford, Tr. 4826), he observed the performance of the Sears dishwasher and found dishes in both racks to be equally clean (Tr. 4869). As previously stated, Mr. Clifford was responsible for procurement of Sears' dishwashers and was also involved in the representations disseminated in Sears' advertising of dishwashers (Clifford, Tr. 4792, 4794–4800). He approved ads containing the top rack claim (Clifford, Tr. 4868). As in the case of Ms. Fraser, Mr. Clifford's testimony amounts simply to an unverified assertion unsupported by any documentation a witness one [sic] with an interest in the outcome of this proceeding that the Sears' dishwasher will perform as advertised. Again, such testimony is unconvincing and unreliable to prove facts of crucial significance in this proceeding.

177. Neither the testimony of Ms. Fraser nor that of Mr. Clifford is reliable, probative or substantial evidence that Sears had a reasonable basis for representing to the public that "dishes in the top rack of the dishwasher will get as clean as those on the bottom rack."

178. Although the truth of Sears' representation that dishes in the top rack of the dishwasher get as clean as those on the bottom rack is not in issue, the truth or falsity of that claim is relevant to the issue of reasonable basis. From the 6(b) materials that were submitted by Sears, it is apparent that the lower rack performed much better than the upper rack. CX 90 shows a considerable difference **[64]**between the cleaning of dishes in the upper rack and in the lower rack, the lower rack being superior. (Sullivan, Tr. 1479, 1502–03, 1590–92). Sears' 6(b) report (CX 83) contains charts showing the results of the CX 90 tests performed at D&M in 1972. These charts are included in this decision in Appendix A. In some of these tests, the same type of cooking dish soiled with the same food was washed in the upper rack and lower rack. The charts show that, in the majority of instances, the dishes washed in the lower rack were cleaned more thoroughly than those washed in the upper rack (CX 83Z007–Z009).

179. Mr. Eberwein testified that he performed many tests on Sears' dishwashers and that there were technical reasons why the Roto-Rack would not clean as thoroughly as the lower rack, such as greater water

pressure from the lower spray arm servicing the lower rack than from the upper spray tube servicing the Roto-Rack, difficulties in weight distribution in the Roto-Rack which affect its rotation, and possible clogging of the upper spray tube (Eberwein, Tr. 1026, 1115–18, 1125-26). In tests of Sears' dishwashers, Mr. Eberwein found that the lower rack performed much better than the Roto-Rack in cleaning pots and pans with baked-on foods. The upper rack's overall performance was not nearly as good as the lower rack (Eberwein, Tr. 1114–15, 1121).

180. The evidence establishes that when Sears advertised that dishes on the top rack would get as clean as those on the bottom rack, Sears did not possess any reasonable basis for making such a claim. Not only did Sears lack a reasonable basis, but the documentation submitted by Sears in its 6(b) report showed that the upper rack did not get dishes as clean as the lower rack, results directly contradictory to Sears' representation.

V. The Demonstrations Do Not Prove, the No Scraping, No Pre-rinsing Claim

181. Paragraph 18 of the complaint charged that Sears represented that the demonstrations used in its advertisements, proved the no scraping, no pre-rinsing claim, and Paragraph 19 charged that the representation was deceptive because the demonstrations did not, in truth, prove the claim. As set out in prior findings, CX 1 contains a picture of the inside of a Sears' Lady Kenmore under the statement, "This demonstration recreates the powerful cleaning ability of Sears Lady Kenmore Dishwasher (Certified by the Nationwide Consumer Testing Institute)." CX 4, a TV commercial broadcast over network television (CX 64A–F), entitled "Birthday Cake," shows the inside of the Lady Kenmore washing dishes during which the following words are superimposed on the TV screen, "Demonstration Certified by Nationwide Consumer Testing Institute" (see CX 55 which is the videotape of CX 4. See also CX 2 and 8). As has already been found in the order granting partial summary decision, Sears' advertisements did represent that these demonstrations proved the no scraping, no pre-rinsing claim.

182. The Nationwide Consumer Testing Institute prepared a [65] "research report" which was submitted to the Commission by Sears as part of its response to the 6(b) Order to file a Special Report substantiating the no scraping, no pre-rinsing claim in CX 1. This report has been received in evidence as CX 87. CX 96 was also submitted by Sears to substantiate the no scraping, no pre-rinsing claim conveyed by the demonstration referred to in CX 2 and other ads.

Like CX 87, CX 96 has been analyzed in detail earlier in this decision. Neither CX 87 nor CX 96 establish that the demonstrations depicted in CX 1, 2, 4, and 8 (CX 55) prove that the Sears' Lady Kenmore will completely remove, without prior rinsing or scraping, all residue and film from all dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

VI. The Owners Manual Instruction

183. The Sears' Owners Manual directed users to "pre-soak or lightly scour firmly cooked or baked-on foods" (CX 99D, 100D). This manual was provided to purchasers of Sears' dishwashers, including the Lady Kenmore, at the same time as Sears' no scraping, no pre-rinsing claim was being made in Sears' advertising. The instruction in the Owners Manual to pre-soak or scour firmly cooked-on foods is directly contradictory to and materially inconsistent with the no scraping, no pre-rinsing representation disseminated in Sears' advertising. The Owners Manual instruction was, therefore, a material fact requiring disclosure.

184. The instruction in Sears' Owners Manual was factually correct since pre-treatment of firmly adhered food soil on dishes, pots and pans was required for them to be washed clean. The instruction appeared not only in the 1972 Owners Manual, but in all Owners Manuals until the 1976 line, when Mr. James Clifford, Sears' national dishwasher buyer, substantially changed the instruction (Clifford, Tr. 4844, 4991). The instruction in the Owners Manual to pre-rinse or scour firmly adhered food soil was correct, the argument of Sears that this instruction appeared in the Owners Manual through "error or oversight" (RPF 193-97; RRB, pp. 48-49) lacks credibility. The contention is discussed later in this decision. The argument is based on the testimony of Mr. Clifford, which has been found to be self-serving and unreliable in this respect. The instruction was disseminated to thousands of purchasers and directly contradicted the advertising representations that Sears was disseminating at the time. Under the circumstances, the instruction was a material fact, as stated, which, in view of Sears' no scraping, no pre-rinsing representation, should have been disclosed. Failure of Sears to disclose that the Owners Manual directed pre-soaking and scouring when it was disseminating its no scraping, no pre-rinsing claim nationwide was deceptive and unfair.

VII. The "Sani-wash" Cycle

185. In the order granting partial summary decision, the law judge

found with respect to the "Sani-wash" that Sears' [66]advertisements represented to the public that the Lady Kenmore kills all harmful and other bacteria and microorganisms on the dishes, pots and pans as charged in Paragraph 15 of the complaint. Sears contends that this ruling was erroneous, and asks that it be reconsidered and vacated (RB, p. 23).

186. Sears' contentions are as follows: the term, "hygienically clean," has been used and approved by GSA and the U.S. Department of Agriculture in contexts making clear that these Federal agencies do not equate the phrase with literal sterilization (RB, pp. 24–25); there is no evidence that Sears' advertisements would be perceived by consumers "as a representation that the dishwasher would literally sterilize dishes and utensils" (RB, p. 29); even if the ads were so perceived, the consumer's understanding of the term, "sterilization" is not necessarily the killing of *all* bacteria and microorganisms because the consumer equates sterilization with the process used to treat baby bottles which is not, in truth, complete sterilization (RB, pp. 27–30); and the Sears' dishwasher does, in fact render dishes "hygienically clean" and "sanitized" "by reducing bacterial populations to levels which are safe from a public health perspective" (RB, p. 30). Complaint counsel vigorously contests the truth of these assertions of Sears.

187. The net impression conveyed by the advertisements to the public controls, and that net impression is not determined by the technical meaning, if any, accorded to the term "hygienically clean" by specialists in GSA or elsewhere.

188. The terms, "sterile" or "sterilization," are not used in Sears' advertisements or in the complaint. In any event, there is no evidence or basis to conclude, as Sears contends (RB, p. 28), that the public understands and believes that "sterilization is what one does to a baby bottle" and that such will not result in the elimination of all bacteria.

189. That the Sears' "Sani-wash" cycle reduces bacteria, if it does, to levels which are safe from a public health standpoint and thus "sanitizes" dishes and gets them "hygienically clean"[4] (RPF 98, *et seq.*; RB, p. 24) is irrelevant to this proceeding. The law judge has found that Sears' advertisements conveyed to the public, or had the capacity to convey, that all harmful and other bacteria and microorganisms on the dishes, pots and pans were killed. If that finding is incorrect, Paragraphs 15, 16 and 17 of the complaint fail. As the law judge ruled during hearings, the question of whether or not the Sears' dishwasher "sanitized" dishes in the sense of reducing bacteria to a safe level of 100 or fewer colonies per utensil is not an issue in the proceeding (Tr.

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[4] Complaint counsel contend this has not been proven by Sears (see CRB, pp. 20–26).

5648). The undersigned reiterates that ruling and no findings on that subject will be made in this decision. [67]

190. Sears' request that the ruling granting summary decision as to the meaning of the "Sani-wash" portion of Sears' advertisements be vacated is denied. Upon review of Sears' arguments, the law judge finds no reason to change the ruling. As set out in that order, based on a reading of the advertisements themselves, the Sears' advertisement conveyed, or had the tendency and capacity to convey, the representation that the "Sani-wash" cycle of the Lady Kenmore destroyed "all harmful and other bacteria and microorganisms on the dishes, pots and pans." There are two issues remaining under Paragraphs 16 and 17 of the complaint. The first is whether or not Sears possessed and relied on a reasonable basis for this representation. The second is whether or not the representation is true. The answer to both of these issues is negative.

A. Lack of Reasonable Basis

191. During this proceeding, on application of complaint counsel, Sears was ordered to produce all documentation upon which it based its statements in CX 1 relating to the "Sani-wash" cycle (CX 239F, specification 2). In compliance with this subpoena, Sears produced 10 documents (CX 240B) which have been received in evidence as CX 242 through CX 251 (see CX 345, pp. 19–20).

192. James Brown, an expert called by complaint counsel, testified on these documents. Mr. Brown's qualifications are set out in Appendix B. Mr. Brown holds a Master's degree in public health from the University of Michigan. He is currently Managing Director of Customer Service, National Sanitation Foundation ("NSF"), Ann Arbor, Michigan. The NSF works with industry, user groups and regulatory agencies to establish standards for food service equipment including dishwashers (CX 302–05, 319; Brown, Tr. 2814–17, 2824). Mr. Brown has studied dishwashers and evaluated their performance (Brown, Tr. 2819, 2827–30). He has authored a publication, "Mechanical Dishwashing," which is used to train sanitary workers in the field evaluation of dishwashers (CX 309; Brown, Tr. 2841–42).

193. Mr. Brown testified that the documents supplied by Sears, CX 242 through CX 251, do not establish that the Lady Kenmore "Sani-wash" cycle will destroy all bacteria and other microorganisms on dishes, pots and pans (Brown, Tr. 2884–85).

194. Dr. Frank Bryan, Chief of Foodborne Disease, Center for Disease Control, Atlanta, Georgia (Dr. Bryan, Tr. 2592), was called by complaint counsel and also testified concerning the Sears' documents, CX 242 through CX 251. Dr. Bryan holds a Ph.D. degree in bacteriology

from Iowa State University (CX 296A; Dr. Bryan, Tr. 2594–95). Dr. Bryan's qualifications are set forth in Appendix B. Dr. Bryan has authored many publications dealing with foodborne diseases, pathogenic microorganisms and their thermal destruction (Dr. Bryan, Tr. 2629–36).

195. Dr. Bryan reviewed CX 242 through 251 and testified that they did not establish that the Sears' dishwasher "would sterilize or [68]kill all microorganisms" on the surfaces of the dishes, pots and pans (Dr. Bryan, Tr. 2641).

196. One of the Sears' documents, a November 12, 1968 letter from a Ms. Virginia Peart, D&M Home Economics consultant, advised the Sears' Home Economics laboratory that "dishwasher temperature (even if 180° F. is achieved) alone cannot *sterilize* tableware" (CX 245B). CX 1 states that the "Sani-wash" cycle provides "an extra-hot 155° final rinse." There is evidence, however, that the "Sani-wash" cycle does not actually reach this temperature (Clifford, Tr. 5045–49).

197. During the course of the hearings, Sears' counsel stated that "Sears did not undertake any bacteria, microbiological testing of its dishwashers prior to the submission of the data that we submitted in the post-complaint subpoena." This referred to "actual physical microbiological tests, swabbing and all of that" (Tr. 2090). The "Standard Swab Test" for detecting the presence of bacteria remaining on the surface of dishes, pots and pans after washing and drying in a dishwasher is not difficult or costly, and has been used by microbiologists for many years (CX 243D–E; Dr. Godwin, Tr. 2085–88, 2091; Dr. Bryan, Tr. 2661–63).

198. Mr. Eugene Kramer, Manager of Environmental Engineering at Sears and former Group Manager of Sears' Chemical Laboratory (Kramer, Tr. 5339–41), testified that in 1971 or 1972 he had verbally approved a request from Sears' Legal Department to use the terms, "Sani-wash" and "hygienically clean" in advertising for Sears' dishwashers (Kramer, Tr. 5351–54). Mr. Kramer served as Sears' microbiologist during the period 1972 through 1975 (Kramer, Tr. 5387, 5493). He testified that Sears had seen no need for microbiological testing of the Sears' dishwasher and that, if any had been done, it would have been done in his laboratory (Kramer, Tr. 5389–90). No such microbiological testing was performed (Kramer, Tr. 5388–90, 5392). To Mr. Kramer's knowledge no tests were performed by Sears on the 1972 through 1975 models of Sears' dishwashers to assess the microbiological capabilities of the "Sani-wash" cycle (Tr. 5392).

199. Sears did not possess and rely on a reasonable basis for the representation found to have been conveyed by the advertising that

the "Sani-wash" cycle destroys all harmful and other bacteria and microorganisms on dishes, pots and pans.

B. Sears' "Sani-wash" Cycle Does Not Destory All Bacteria and Microorganisms on the Dishes, Pots and Pans

200. The Sears' Lady Kenmore's "Sani-wash" cycle does not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans. In one of the documents submitted by Sears in response to the subpoena issued by the law judge requiring production of all documents relative to the "Sani-wash" statements in CX 1, the following appears (CX 242D): **[69]**

> Apparently many consumers believe that home-type dishwashers "sterilize" the utensils. It is obvious from the results summarized above that this term, which means destruction of *all* microorganisms, cannot be used. It is probable that the word "sanitize" can be used, since a larger percentage of the utensils were acceptable by Public Health Standards.

This statement appeared and was reprinted in an article in *Soap and Chemical Specialities*, by three authors from the Agricultural Research Service, U.S. Department of Agriculture, Beltsville, Maryland.

201. Another document furnished by Sears in response to the subpoena issued by the law judge is entitled "Microbiology and Public Health Aspects of Home Appliances," and is a paper delivered at a meeting of the American Society of Sanitary Engineering in October 1970 (CX 243). According to this study, although mechanical dishwashers did a creditable job of reducing bacterial count below 100 colonies per utensil, all bacteria and microorganisms were not killed (CX 243N).

202. Dr. Glyn J. Godwin testified as an expert witness in this proceeding on the "Sani-wash" issues. Dr. Godwin has a Master's degree in microbiology from Southeastern Louisiana University and has a Ph.D. degree in food science from Louisiana State University. He is a registered food, dairy, industrial, agricultural and sanitation microbiologist (CX 293A; Dr. Godwin, Tr. 2035–36). His qualifications are contained in Appendix B. Dr. Godwin agreed with the statement in CX 245B, the letter from Ms. Peart of D&M to Sears' Home Economics laboratory, referred to in a preceding finding, that even if the temperature of 180° were achieved in a dishwasher all microorganisms would not be killed. Dr. Godwin testified that such a temperature is not "sterilization temperature" and "does not kill spores [which] can easily survive that heat treatment." (Dr. Godwin, Tr. 2060–61).

203. Dr. Bryan testified that domestic household dishwashers are not designed to kill all microorganisms present on cooking and eating dishes placed in them (Dr. Bryan, Tr. 2637). More specifically, Dr.

Bryan testified that the Sears' "Sani-wash" water temperature of 155° for two minutes (even if achieved) would not kill all microorganisms on cooking and eating utensils (Dr. Bryan, Tr. 2664).

204. Mr. Brown testified that dishwashers do not sterilize dishes and that certain types of organisms and spores would survive the temperature and duration of the "Sani-wash" cycle (Brown, Tr. 2851, 2853–57).

205. Dr. Charache, a physician and Director of Microbiology, [70] Johns Hopkins University School of Medicine, testified that various pathogenic microorganisms would survive the "Sani-wash" cycle (Dr. Charache, Tr. 6120). Dr. Charache's qualifications are set forth in Appendix B.

206. Furthermore, Sears' own witnesses, Dr. Ordal and Mr. Kramer, testified that the "Sani-wash" cycle on Sears' dishwashers, with its temperature of 155° F., will not sterilize dishes (Kramer, Tr. 5482; Dr. Ordal, Tr. 5760–61, 5773). Dr. Ordal's qualifications are set forth in Appendix B.

207. Thus, the "Sani-wash" cycle does not kill all harmful and other bacteria and microorganisms on dishes, pots and pans.

C. "Materiality"

208. While he was an assistant professor at the University of Rhode Island, Dr. Godwin was the food science expert for the state (Dr. Godwin, Tr. 2029). He is a member of the Institute of Food Technologists and its Division of Food Microbiology (Dr. Godwin, Tr. 2031–32; CX 293A). Dr. Godwin is particularly familiar with the critical points in food processing and canning (Dr. Godwin, Tr. 2036–37).

209. Dr. Godwin testified on the safety of processing jars that are to be used in home canning in the "Sani-wash" cycle instead of using stronger bactericidal measures. Dr. Godwin testified that spores of clostridium botulinum bacteria may remain on canning jars after being washed in the Sears' dishwasher with the "Sani-wash" cycle and then germinate once food is put in the jars (Dr. Godwin, Tr. 2120). Spores of botulinum bacteria could also be redeposited in the glass canning jars on residue from other dishes and objects in the dishwasher (Dr. Godwin, Tr. 2123). The spores of botulinum organisms are widely found in nature and would commonly be found in the kitchen (Dr. Charache, Tr. 6123–27). Once the spore germinates, the bacteria can grow and multiply within the food, creating botulinum toxin (Dr. Godwin, Tr. 2120). The toxin is dispersed in the food and there may not be any odor to warn that the food is contaminated (Dr. Godwin, Tr. 2120–21). It is common knowledge that botulinum toxin is one of the most dangerous

toxins known to man and even 1.6 billionth of a gram can kill a full grown person (Dr. Godwin, Tr. 2120).

210. If the Sears' advertisements cause purchasers who engage in home canning to believe mistakenly that the "Sani-wash" cycle kills all bacteria and other microorganisms when it does not, there is more than a theoretical possibility of serious harm (Dr. Godwin, Tr. 2119–21) particularly in view of the large number of dishwashers that Sears markets annually.

211. In addition to home canning, there are other significant risks if purchasers mistakenly believe that the Lady Kenmore's "Sani-wash" cycle kills all bacteria and other microorganisms when it does [71]not. Spores of various bacteria will survive the "Sani-wash" cycle (Dr. Godwin, Tr. 2061, 2063–66; Dr. Bryan, Tr. 2664–67; Brown, Tr. 2853–59). Such surviving spores can pose a health risk to human beings (Dr. Godwin, Tr. 2063–64, 2119–22; Dr. Bryan, Tr. 2670–78; Brown, Tr. 2859; Dr. Charache, Tr. 6128).

212. Dr. Bryan testified that if bacillus enteritidis, clostridium botulinum, or clostridium perfringens spores remain on food storage utensils after surviving the "Sani-wash" cycle, they may return to a vegetative, *i.e.*, multiplying, state as a result of food being stored in the utensil and, thereupon, can cause gastroenteritis or botulism (Dr. Bryan, Tr. 2670).

213. Dr. Charache also testified that certain health risks could arise if purchasers of Sears' dishwashers erroneously believed that the "Sani-wash" cycle killed all bacteria and other microorganisms (Dr. Charache, Tr. 6128–31). Spores that survived could return to the vegetative state and produce a toxin that causes disease (Dr. Charache, Tr. 6129–30). If the utensils are mistakenly thought to be sterile, the person who uses them may handle them as though they were sterile and put other products in them which would be contaminated (Dr. Charache, Tr. 6130–31). Susceptible individuals such as infants could be adversely affected (Dr. Charache, Tr. 6128–29).

214. One of Sears' print ads, "Eight Things That Make Lady Kenmore the Best Cleaning Lady in Town" (CX 3) published in *Better Homes and Gardens* and *House & Garden* magazines (CX 71, 72), advertised the "Sani-wash" feature as "especially nice for glasses and baby bottles," as set out earlier. Dr. Charache testified that before recommending washing baby bottles in a dishwasher she would want to be certain of how well the dishwasher removed the milk deposits and residual film of milk because the long, narrow shape of baby bottles makes them difficult to clean (Dr. Charache, Tr. 6135). Based on the representation in this advertisement, however, purchasers of Sears' dishwashers may believe erroneously that all the bacteria and microor-

ganisms on baby bottles are killed after being washed in the "Sani-wash" cycle. As a consequence, they may put milk or some other food into the bottles and use them without first boiling the bottles (Dr. Charache, Tr. 6135–37). If this were done, and all bacteria and microorganisms had not been killed, the infant might receive a heavier than desirable bacterial load and be subject to harm (Dr. Charache, Tr. 6137–38).

215. Dr. Bryan testified that a clostridium botulinum spore on a baby bottle could survive the "Sani-wash" cycle, produce toxins and cause an illness called infant botulism (Dr. Bryan, Tr. 2670–71, 2673–75). Infant botulism differs from botulism in that only the spore need be ingested to cause it. The spore can germinate in the infant's intestine and produce toxin with potentially dangerous consequences (Dr. Bryan, Tr. 2670–71, 2673). Nelson, *Textbook of Pediatrics*, Tenth Edition, 1975, recommends the boiling of baby bottles for 5 to 10 minutes (CX 340D). Dr. Bryan testified [72]that this was a standard procedure which was usually recommended because "[i]nfants are far more susceptible to smaller numbers of microorganisms than adults" (Dr. Bryan, Tr. 2681–83). Dr. Charache agreed that boiling baby bottles was desirable "to reduce the bacterial load . . . so you are not giving the infant large numbers of pathogens with the milk" (Dr. Charache, Tr. 6134). She testified that "if the person using the dishwashers had the impression that the dishwasher made the bottle cleaner than it did, then this would be a danger" (Dr. Charache, Tr. 6135). Although there is some conflict in the record on the question of boiling baby bottles that are to be used to feed newborn infants (see RX 171), the preponderance of the evidence establishes that the practice is desirable to avoid the possibility of disease. The Sears' advertisements for the "Sani-wash" feature have the capacity to induce purchasers to cease using this procedure which could prevent illness in newborn babies under the mistaken impression that the dishwasher's "Sani-wash" cycle kills all bacteria and microorganisms when it does not in actuality, do this. [73]

DISCUSSION

Sears disseminated advertising nationwide which made an affirmative product claim for its dishwashers. It is an unfair practice and a violation of Section 5 of the Act to make such a claim without a reasonable basis. *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). It is well established that an affirmative product claim necessarily carries with it a representation that the party making it possesses a reasonable basis for the claim. *National Commission on Egg Nutrition*, 88 F.T.C.

89, 191 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977); *cert. denied*, 99 S. Ct. 86 (1978); *National Dynamics Corp.*, 82 F.T.C. 488, 549–50 (1973), *aff'd*, 492 F.2d 1333 (2nd Cir.), *cert. denied*, 4[illegible] U.S. 993; (1974); *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 451–52 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

It has been found that Sears did not have a reasonable basis for the no scraping, no pre-rinsing claim it disseminated. In determining whether or not Sears possessed and relied upon a reasonable basis, it has been necessary to consider the standard that should be applied. Complaint counsel contend that the standard which should govern in this case is "valid and reliable scientific tests" (CPF 90). According to complaint counsel, valid and reliable scientific tests, which they would require of Sears, should have included a truly representative range of food products, food preparation procedures, and cooking temperatures. Among other things, Sears' tests should have taken into account normal variations in usage of the dishwasher by consumers such as use of detergent and loading technique, and should have controlled the many other variables which affect dishwasher cleaning performance. Complaint counsel contend that procedures, methodologies, conditions and results should have been reported in detail so that the tests could be run again and similar results obtained. A scoring procedure should have been utilized to record the results at the conclusion of the tests, and the tests should have been replicated at least three times to check the validity of the results.

Sears argues against the standard of "valid and reliable scientific tests" (RRB, pp. 8–9). Sears contends that "the technical, laboratory-controlled tests which complaint counsel would require as a reasonable basis for these claims are in fact *not* necessary to their substantiation; and this is particularly true with respect to the claims in issue in this proceeding, which were approved and disseminated during the very time period in which the Commission, in *Pfizer*, held that 'scientific' tests would not invariably be required in order to find a reasonable basis for advertising claims" (RRB, p. 9).

In *Pfizer*, the Commission made it clear that what constitutes a reasonable basis for a claim was a factual issue which would be determined on a case-by-case basis. 81 F.T.C. at 64. The Commission further pronounced that "adequate and well-controlled scientific studies or tests" were not required for every claim. 81 F.T.C. at 68. [74]

In the factual setting of this case, Sears was not limited to "adequate and well-controlled scientific studies or tests" in order to be held to have had a reasonable basis for the no scraping, no pre-rinsing claim. Safety was not involved in the claim, nor was health in any immediate sense, although complaint counsel make an argument to

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this effect. The product was a dishwasher, not a food, drug, or potentially hazardous product. The consequences of the falsity of Sears' representation did not involve possible personal injury or property damage. Sears, therefore, was entitled to rely upon other evidence and information not necessarily rising to the level of "adequate and well-controlled scientific studies or tests," so long as that evidence and information did, in fact, provide a reasonable basis for the claim.

Sears submitted materials in its Special Report (CX 83) in response to the Commission's 6(b) Order (see, *e.g.*, CX 88, 90) which it characterized as "tests" of the cleaning ability of its dishwashers. Although, these tests were not required to be "adequate and well-controlled scientific tests," they certainly were required to be competent and reliable.

Sears' tests, however, were quite inadequate and under no circumstances could they be described as competent and reliable. In fact, whether Sears should be held to the standard of "adequate and well-controlled scientific studies or tests," or to some lesser standard, is an academic point because Sears did not possess and rely upon competent and reliable evidence in any form, tests or otherwise, for its claim. Sears simply did not possess any evidence or substantiation which could be judged to constitute a reasonable basis for the no scraping, no pre-rinsing representation.

The materials submitted to the Commission by Sears in the 6(b) Special Report (CX 79 - 100) have been the subject of detailed findings set out earlier in this decision. As found therein, these materials neither constituted a reasonable basis for Sears' no scraping, no pre-rinsing claim nor showed that Sears' dishwasher would perform as was represented to the public. Sears' tests submitted in response to the 6(b) Order showed in many instances that the washed dishes emerged from the dishwasher still dirty. Clearly, a reasonable basis for Sears' claim cannot be found in test results showing dirty dishes.

Sears contests that conclusion, arguing that the complaint limited the no scraping, no pre-rinsing claim in paragraph 10 to "normal consumer conditions" (RRB, pp. 5–8, 12). According to Sears, this is different from the claim that it was asked to substantiate in the Commission's 6(b) Order to file a Special Report and, therefore, "the documents submitted in response to the Section 6(b) Order reflect the dishwasher's cleaning ability *under conditions which are more rigorous than those experienced in the home*" (RRB, p. 5). In other words, Sears argues that reports showing still dirty dishes in Sears' "Substantiating" materials do [75]not reflect "normal consumer recipes" and, therefore, neither prove that Sears lacked a reasonable basis for the no scraping, no pre-rinsing claim nor show that Sears' dishwasher will not perform as represented. Sears states that the "tests" and documentation submitted in its 6(b) report "show the dishwasher's performance under aggravated circumstances, which is indicative of its *enhanced* performance ability under circumstances normally encountered in the home" (RRB, p. 5).

In further defense against the contention that it lacked a reasonable basis for the no scraping, no pre-rinsing claim, in addition to the 6(b) material, Sears relied in this proceeding on the testimony of Mr. James Clifford, its dishwasher buyer (RPF 8–14, 27), on the testimony of Ms. Barbara Fraser, an employee of D&M (RPF 15–26), on the several instances in CX 90, which was submitted as part of Sears' 6(b) report, in which dishes did come out of the dishwasher clean and where Sears asserts the food soils reflected "normal consumer procedures" (RPF 25), and finally on a memorandum of Ms. Judith Cannon, a former home economist with Sears (RPF 28), which Sears quotes as stating, "There is no need to pre-rinse dishes before washing, but it is necessary to remove large pieces of food from dishes" (CX 141A).

This evidence has been reviewed in detail in the findings and found to be grossly deficient, both as a reasonable basis for Sears' claim and as evidence that Sears' dishwashers eliminated the need for pre-scraping and pre-rinsing. For example, in citing Ms. Cannon's memorandum, Sears fails to quote her final statement which specifically contradicts Sears' claim where she advised her superiors at Sears, "Baked or burned-on soil (cooking utensils: Casseroles, pans, etc.,) usually requires some additional effort for complete removal in a dishwasher" (CX 141A).

In addition to the preceding evidence, Sears also relied on tests conducted by IIT (Illinois Institute of Technology) for use in this litigation to support the truth of its claim, contending that its dishwashers did, in fact, eliminate the need for pre-treatment of dishes, pots and pans and would perform as represented.

The argument that inclusion in the complaint of the qualifying language, "according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers," materially changed what Sears was called upon to substantiate by the Commission's 6(b) Order is rejected. The language in the complaint merely eliminated any possible interpretation that the Commission was challenging Sears' advertising on the ground that the Lady Kenmore would not remove every totally abnormal and unreasonable food soil occurring on dishes, pots and pans in the kitchen. Food soils that were the result of kitchen disasters or which it was otherwise unreasonable to expect *any* dishwasher to remove were eliminated from the scope of the representation Sears was found to have made. On occasion people forget that cooking dishes are in the oven or on the stove; as a consequence, extensive burned-on food residue may result [76]which is so severely adhered to the dish, pot or pan that it is extremely difficult to remove even with intensive scraping by hand. This is a common experience. The complaint freed Sears from the contention that its advertising was false because, without pre-treatment, the Lady Kenmore would not completely clean such dishes, pots and pans.

However, the language of the complaint did not limit its challenge to the truth of Sears' no scraping, no pre-rinsing representation only to food soils resulting from carefully followed cookbook recipes. The language of the complaint did not free the no scraping, no pre-rinsing claim from challenge whenever testimony could be elicited from a witness that particular food soils were not "normal" or not prepared in a way "that they would normally be prepared" (Fraser, Tr. 5109). By this standard, an omelet prepared "with milk rather than water" would not constitute a "normal" recipe, a contention made by Sears (RPF 31). Failure of Sears' dishwasher to remove such a food soil from dishes, pots and pans, by the standard Sears would impose in this proceeding, cannot be used either to judge whether or not Sears had a reasonable basis for the no scraping, no pre-rinsing claim or to judge whether that claim was true. Such trivial distinctions by Sears border on frivolous argument and are rejected.

Sears' no scraping, no pre-rinsing representation was unlimited and unqualified, as emphasized. CX 1 is an example; this advertisement was specifically incorporated into the complaint and challenged as false. CX 1 was the advertisement transmitted to Sears in 1975 for substantiation under the 6(b) Order. As stated in the beginning of the findings in this decision, the public cooks in myriad ways. Many individuals do not follow cookbook recipes, improvising their own recipes instead. They also cook the same foods for different amounts of time in different types of cookware under varying degrees of heat. They store food in casseroles, pots, pans and other dishes, to be heated and reheated for later meals. Some individuals may leave dishes, pots and pans unwashed for considerable periods. In sum, the public uses a tremendous variety of cooking techniques, recipes, methods and procedures. All of these fall within the ambit of the complaint and the qualifying language of Paragraph 10 except, in fairness to Sears, disasters or procedures that produce food soils which it would be unreasonable to find that even Sears' unlimited claim represented would be removed by the Lady Kenmore without pre-scraping, pre-rinsing, or other pre-treatment.

Whether Sears possessed a reasonable basis for its claim, and whether Sears' dishwasher would actually perform as advertised, were not tested against kitchen disasters or unreasonable food soils. As stated above, the tests which Sears submitted in response to the 6(b) Order specifically showed that, in many instances, food soils neither resulting from disasters nor unreasonable cooking procedures remained on dishes after being washed in Sears' dishwasher. [77]

Sears contends, as indicated earlier, that the results should not be considered because the degree of tenacious adherence of the food soils in the "tests" submitted with its 6(b) documentation was "beyond that achieved by following customary in-home cooking procedures" (CX 83U). Therefore, the fact that the food soils were not removed does not show that Sears lacked a reasonable basis for its advertising claim and does not constitute evidence that Sears' dishwashers would not perform as advertised.

This line of argument is rejected. Examination of the food soils and method of cooking in CX 90 reveals neither kitchen disasters nor food soils resulting from unreasonable cooking procedures which it would be unfair and unreasonable to expect Sears' dishwashers to clean without scraping or pre-rinsing. For example, an omelet made with milk rather than with water, referred to earlier, is clearly not an abnormal food soil that would be excluded by the complaint from consideration as a soil to be tested. Nor are the other food soils used in CX 90 abnormal (see Sullivan, Tr. 1475–76, 1478, 1481–82, 1522–23, 1530–38, 1550; Ferguson, Tr. 1697, 1701–05, 1708–12, 1720, 1722–24, 1732–33). The same is true for CX 89, the test protocol used by D&M for the test reported in CX 88 in which dishes were not, in many instances, washed clean by Sears' dishwasher (CX 88Z). Far from substantiating the no scraping, no pre-rinsing claim, the 6(b) documents demonstrate that Sears' dishwashers will not perform in accordance with the promise of Sears' advertisements and therefore, that Sears' representation was false.

The IIT tests also do not establish the truth of Sears' claim. These tests, too, have been the subject of detailed findings. Aside from serious methodological deficiencies, the tests did not, in a number of instances, produce clean dishes, pots and pans. Although Dr. Norman and Ms. Bryant, assisted by counsel for Sears, ran two test loads in May, two in June 1978, and one in July 1978, Sears has rejected all but Load 2 in the June tests and the July load. The basis for this position is Sears' contention that the May Load 1 test and the June Load 1 test did not use the "power wash" cycle. This contention has been considered in the findings. Sears made the no scraping, no pre-rinsing claim for "Kenmore" dishwashers (CX 5, for example), not only the "Lady Kenmore" which is the only Sears' dishwasher that has the "power wash" cycle. Furthermore, Sears has admitted both that the cleaning ability of the Kenmore and Lady Kenmore dishwasher models are the same and that the "normal wash" cycle on the Kenmore models is the same as the "power wash" cycle on the top-of-the-line Lady Kenmore (RPF 15, 18).

Looking beyond that, however, there is no basis for the contention that the food soils used in May Load 2 were abnormal and that it was unfair to test the performance of Sears' dishwasher with these soils. These food soils were specifically devised by the Association of Home Appliance Manufacturers to "establish a uniform [78]and repeatable procedure or standard method for measuring specified product characteristics of dishwashers" (CX 185). Sears' objection appears to be another example of a pattern to eliminate from consideration all items of evidence showing that Sears' dishwashers will not eliminate the need for scraping, pre-rinsing, or other pre-treatment of firmly adhered food soils.

Sears disseminated throughout the country for between three to four years a blanket, unlimited claim by which it sought to persuade hundreds of thousands of consumers to buy its dishwashers. During this time period, Sears increased its share of the home dishwasher market in the U.S. and derived great economic benefits. It is ironic that Sears, when called to account, now urges a highly restrictive and technical approach to the evidence, including the very tests Sears conducted for use in this proceeding as well as the tests that Sears submitted as substantiation in 1975 in response to the Commission's 6(b) Order (see RRB, pp. 5–37). Nevertheless, even June Load 2 and the July test did not result in all the dishes coming out completely clean (RX 181, 182).

But the two isolated IIT tests (June Load 2 and the July test) would not rebut the burden of proof met by complaint counsel, even if all the dishes were clean. It is fundamental that the unlimited Sears' claim cannot be proven true by merely two test operations of Sears' dishwasher where the food soils used are not truly representative of the tremendous variety of food soils occurring "normally and expectably" in the nation's kitchens. Moreover, there is no truly credible means of ascertaining just how clean the dishes were after they had been removed from the dishwasher. Clearly, the photographs are an inaccurate record of the state of the dishes; photographs do not show all sides of a dish and may often fail to reveal retained or redeposited food soil that would become evident upon visual or tactile inspection. The dishes themselves increasingly lose value as a record of cleaning performance in proportion to the length of time that passes after their removal from the dishwasher. At the time the dishes were examined for the record in this proceeding, December 1978, approximately six months had elapsed from the IIT test dates; at the writing of this decision, over one year has passed. During that period, the dishes have been handled several times, exposed to air, and shipped to different locations. The dishes, both at time of trial and now cannot be relied on to show that clean results were obtained.

Sears had no reasonable basis to advertise, as it did in CX 1 for instance, that "the dishes on top get as clean as those on the bottom." Sears possessed no tests conducted to determine whether this claim could be made truthfully. The unreliability and self-serving nature of the testimony of Mr. Clifford and Ms. Fraser has been discussed in the findings. Although the truth of this representation has not been challenged, the very materials that Sears submitted in alleged substantiation of its claims constitute evidence that the top rack did not get dishes as clean as those on the bottom [79]rack.

In some of its advertisements, as set out in the findings, Sears used visual depictions of the inside of its dishwasher during the washing cycle to reinforce the impact of the no scraping, no pre-rinsing claim (CX 1, 4). Sears represented that such demonstrations were certified by the "Nationwide Consumer Testing Institute" and proved the no scraping, no pre-rinsing claim. The tests of the "Nationwide Consumer Testing Institute" do not establish the truth of the claim. Indeed, they are close to preposterous as proof of Sears' unlimited and unqualified claim in CX 1, "No scraping. No pre-rinsing. Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off." The demonstrations in the ads plainly do not provide visual proof of Sears' claim, *Colgate-Palmolive Co.* v. *F.T.C.*, 380 U.S. 374 (1965), and do not reflect the complete inadequacy of the tests of "Nationwide Consumer Testing Institute" to prove the claim, thus misleading the public. *Standard Oil Co. of California*, 84 F.T.C. 1401 (1974), *modified*, 577 F.2d 653 (9th Cir. 1978).

Sears' Owners Manual, which was given to purchasers of Sears' dishwashers, including the Lady Kenmore, instructed users to pre-soak or scour firmly cooked or baked-on foods (CX 99D, 100D). This instruction contradicted the representation contained in Sears' advertisements which were being disseminated at the same time. The instruction to pre-soak or scour firmly cooked-on and baked-on food is clearly a material fact directly relating to the no scraping, no pre-rinsing claim. Sears explains this contradiction by a two-pronged argument. Sears asserts that its dishwashers will perform as advertised and, consequently characterizes the instruction in the Owners Manual as a mistake (RRB, p. 48). In other words, Sears contends that the advertisements are right and the instruction in the Owners Manual is wrong.

Addressing the first argument, it is clear that Sears' dishwasher will not perform as represented. Sears' dishwasher will not completely remove all firmly cooked-on and baked-on food residue and film from cooking and eating dishes without pre-treatment. The statement in the Owners Manual is correct. The second argument that the instruction to pre-soak or scour firmly cooked-on or baked-on food was retained in the Owners Manual for years through oversight or error is incredible. It is based on the testimony of Mr. Clifford which has been found to be self-serving and unreliable in this respect.

As described earlier, Mr. Clifford, Sears' dishwasher buyer, asserted that his visits to the Home Economics kitchen of Sears, which was located across the street from his office and where he observed, on occasion, the operation of the Lady Kenmore, convinced him that the Owners Manual instruction was in error. According to Mr. Clifford, he then changed the instruction for the 1976 line. However, no other evidence supports Mr. Clifford's assertions. On [80]the contrary, Ms. Cannon, who was a Sears' Home Economist at the time and who worked on the 1976 Owners Manual, did not recall anyone suggesting that the instruction was in error (Cannon, Tr. 2543). She also testified that she believed pre-soaking or scouring was required for some cooking dishes for them to be cleaned (Cannon, Tr. 2543–44). The instruction remained in Sears' Owners Manuals for the years 1972, 1973, 1974 and 1975, until the 1976 line was put into production in 1975. As late as April 29, 1975, Sears' Consumer Services Manager advised a purchaser, who apparently had complained about the dishwasher's cleaning of cooking utensils, that "light - scouring may be necessary" for foods "baked on during the cooking process" (CX 186). Sears' claim that the instruction to pre-soak or scour firmly cooked or baked-on foods was in the Owners Manual by mistake is beyond credibility and is rejected. For Sears to have secured purchasers by promising "no scraping, no prerinsing," and then to have told them the exact opposite in instructional materials, is unfair and deceptive. *Montgomery Ward & Co., Inc.*, 70 F.T.C. 52 (1966), *aff'd*, 379 F.2d 666 (7th Cir. 1967).

Sears disputes the law judge's finding that Sears advertisements represented that the "Sani-wash" cycle destroyed "all harmful and other bacteria and microorganisms on the dishes, pots and pans." It is clear that the representation was made, not only from Sears' advertisements in general, but from CX 3 in particular. That advertisement, disseminated nationally in 1972 (CX 72), states that the "Sani-wash" cycle is the Lady Kenmore dishwasher's way:

> . . . of getting dishes hygienically clean. It gives your dishes a final rinse in 155° water which is especially nice for glasses and baby bottles.

It is a legitimate question to ask why Sears chose to make a specific reference to "baby bottles." This can not be attributed to accident; on the contrary, in the view of the law judge, the reference had an obvious purpose.

It is everyday knowledge that boiling bottles that are used to feed babies only a few weeks old has been a commonplace practice among the American public for many years. The practice is grounded on the assumption that boiling baby bottles kills all the microorganisms on them and "sterilizes" the bottles. Whether or not this is true, the public has the impression that it is true. Sears' advertising exploited that belief by equating the performance of the "Sani-wash" cycle with the boiling of baby bottles. Sears' "Sani-wash" cycle does not sterilize baby bottles or dishes, pots and pans by killing all microorganisms, and Sears had no reasonable basis for making this representation.

As already determined, even if the term "hygienically clean" has [81]a meaning to the scientific community, or to a portion of that community, and this is sharply in dispute (see Dr. Ordal, Tr. 5641, 5848–62; Dr. Charache, Tr. 6081–88), the message that is conveyed to the public is what counts. The public plainly may not understand the technical meaning of the term "hygienically clean," but rather may conclude from that term and from the net impression conveyed by Sears' advertisements that the "Sani-wash" cycle sterilizes dishes, pots and pans. See *Murray Space Shoe Corp.* v. *F.T.C.*, 304 F.2d 270, 272 (2nd Cir. 1962); *Carter Products, Inc.* v. *F.T.C.*, 323 F.2d 523, 528 (5th Cir. 1963); *Sun Oil Co.*, 84 F.T.C. 247, 270 (1974).

Sears' contentions that the "Sani-wash" cycle gets dishes "hygienically clean," and that it "sanitizes" dishes, rendering them safe to use, are irrelevant. Complaint counsel question these contentions and argue that Sears did not prove that the "Sani-wash" cycle raised the surface temperature of dishes, pots and pans to 155° or that the "Sani-wash" cycle "sanitized" dishes (see CPF 215–17; CB, pp. 29–30). Since Sears' representation that the "Saniwash" cycle kills all harmful and other bacteria and microorganisms on dishes, pots and pans is false, Sears' argument that the dishwasher does render the dishes safe from a public health standpoint is beside the point.

It is elemental that the public is entitled to get what is represented to it. *Waltham Watch Co.* v. *F.T.C.*, 1692, 1724 (1962), *aff'd*, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963); *Manco Watch Strap Co.*, 60 F.T.C. 495 (1962). Consumers paid substantially more for Sears' dishwashers which had the "Sani-wash" cycle. Sears' advertisements had the capacity to cause prospective purchasers to pay substantially more for such dishwashers on the erroneous belief that the cycle killed all microorganisms on the dishes, pots and pans, including baby bottles. If Sears' dishwashers did not do this, then the additional purchase price was paid by the public for performance it did not obtain. Moreover, there is more than a purely theoretical possibility of actual harm from Sears' representation. There is substantial evidence, set out in the findings, that a mistaken belief on the part of the public that dishes, pots and pans, including canning jars and baby bottles, have had all bacteria and microorganisms on them killed has the capacity to cause actual injury.

REMEDY

The representations contained in Sears' advertisements which are the subject of this proceeding were disseminated in all media, television, radio, newspapers, magazines, catalogues and point of sale, were directed to both national and local audiences, and were disseminated from the latter part of 1971 through much of 1975, a three to four year period (CX 62–77). Relatively large amounts of money were expended in this advertising campaign, *i.e.*, over one and one-half million dollars in 1971, and around two million dollars in each of the years 1972 through 1974. [82]

Although intent is not an element of a false advertising charge, intent can bear on the quality of the violation, the likelihood of repetition, the need for an order and the scope of its provisions. *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 428–31 (1957); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88–90 (1950). Even if the dubious nature of the Sears' claim is put aside from the time it was first disseminated in 1971, the record shows from internal Sears' documents (*e.g.*, CX 125) widely circulated in the company (CX 272) that Sears had to know by June 1973 that its broad no scraping, no prerinsing claim was false. Market research of a highly reliable nature (Dr. Kassarjian, Tr. 1814–17, 1844–46) conducted by questioning a large number of recent purchasers of Sears' Lady Kenmore dishwashers revealed that a substantial proportion disagreed completely with the question, "Does not require prerinsing." Over half of recent Lady Kenmore purchasers surveyed, having used the machine in their homes, refused to register complete agreement with this statement (CX 125Z029). Over 70% of those surveyed refused to agree completely with the statement, "Washes pots and pans thoroughly" (CX 125Z030).

Notwithstanding this information obtained through market research from a large percentage of purchasers of the Lady Kenmore indicating that they had found the no scraping, no pre-rinsing claim untrue, Sears continued to disseminate the representation nationwide over all media. Sears did not even conduct an inquiry to evaluate the propriety of the claim in view of the results of its survey, but continued to disseminate the claim through 1975 (CX 64E, F, 67, 69, 75).

But there is more to the situation than the foregoing. Sears conducted extensive market research in 1972 to find out what it was that members of the public most desired in a dishwasher (CX 136, 180, 205). This research showed that a large segment of the public wanted a dishwasher which eliminated the need for pre-scraping and pre-rinsing, and was willing to pay more for this feature (CX 136Z008 - Z009, 155H; Dr. Kassarjian, Tr. 1858-63). The ability of a dishwasher to clean dishes on the upper rack as thoroughly as those on the bottom rack was also an important factor to the public (CX 140D, 180Z029 - Z033; Dr. Kassarjian, Tr. 1911-17), as was the ability of a dishwasher to clean pots and pans (CX 140D, 180Z029-Z033; Dr. Kassarjian, Tr. 1900-02, 1911-17, 1924-25).

Armed with the knowledge that the consumer wanted a dishwasher that would not require pre-scraping or pre-rinsing of dishes, including cooking and baking dishes, Sears and J. Walter Thompson Company, its advertising agency, planned and conducted the advertising campaign for Sears' dishwashers (see CX 142A, Y, Z028-029, 143E-M and O, 148-49, 151A, I, N and O, 165A-C). As an example, in a presentation to Sears and its advertising agency on the Lady Kenmore, dated February 18, 1972, the "Creative Objectives" of two commercials, one of which was "Birthday Cake" (CX 4), were stated (CX 193C):

> To present the superiority of the Lady [83]Kenmore for its ability to eliminate scraping and pre-rinsing of dishes.

The campaign was effective. A "Mail Panel Awareness Tracking Study" (CX 130) conducted in two "waves" for Sears in December 1973 and July 1974 (CX 130D) revealed that 28% and 23% of persons contacted in waves 1 and 2, respectively, associated the no scraping, no pre-rinsing attribute with Sears' dishwashers, 23% and 21%, respectively, associated the attribute "clean pots and pans" with Sears' dishwashers, and 21% and 19%, respectively, associated "jets for scouring dishes" with Sears' dishwashers (CX 130J, Z002).

With no proof that the no scraping, no pre-rinsing representation for its dishwashers was true, and with actual evidence early in the advertising campaign in its possession and available that the claim was false (CX 88, 90, 125), Sears nonetheless disseminated the claim through all media nationwide.

Not only did Sears disseminate false advertising, exploiting what it had found the public wished for in a dishwasher, but Sears apparently realized a commercial advantage in so doing. Sears increased its share of the dishwasher market from 26% in 1971 to 29% through August 1973 (CX 151C). Sears increased the sales of its top-of-the-line Lady Kenmore model from 35,029 units in 1971, when that model accounted for 10% of line sales, to 105,570 units in 1973, when that model accounted for 23% of line sales (CX 151E). Sears' market position was even higher as of the date of this proceeding, at which time Sears was the leading marketer of dishwashers to consumers with about one-third of the market (see Order of September 27 continuing certain pages of the transcript in an *in camera* status).

The attribution of Sears' enhanced market position in the sale of dishwashers, in whole or in part, to the representations at issue in this proceeding admittedly requires that a causal relation be found between Sears' advertising and its increased market share. Such a causal relation is probably impossible of absolute proof, but is an appropriate subject of inference. Such an inference is reasonable based on this record. In the opinion of the law judge, deceptive and untrue advertising claims challenged in the complaint in this proceeding, disseminated over a three to four year period, contributed to some extent to the growth of Sears' market share.

Sears is not a stranger to Commission proceedings. Only two years ago a cease and desist order was consented to by Sears settling a formal adjudication proceeding charging the use of misleading and deceptive "bait and switch" practices in the advertising and sale of "sewing machines, washers and dryers, and other major home appliances." *Sears, Roebuck and Co.*, 89 F.T.C. 229, 230 (1977). In a separate statement in that decision, then Chairman Engman and Commissioner Hanford characterized Sears' conduct as "a blatant bait-and-switch advertising scheme." 89 F.T.C. at 233. Prior violations are proper for consideration in determining the entry of a cease and desist order and the scope of its provisions. *Porter & Dietsch* v. [84]*F.T.C.*, 90 F.T.C. 770, 880–81 (1977), *modified*, Nos. 78–1324 and 78–1497 (7th Cir. August 8, 1979).

A cease and desist order must be entered. A broad order is essential not only to remedy the specific violation disclosed by the record, but to prevent future violations by Sears in the promotion of kindred appliances falling into the category of "major home appliances." Under the circumstances, "fencing in" is required. *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419, 451 (1957). The term "major home appliance" is not an arbitrary category but is a recognized industry term which has been defined by the Association of Home Appliance Manufacturers in its bylaws as follows (CX 288):

> The term *major home appliance* means large, energy-operated appliances used in the

home and includes such products as room air conditioners, dishwashers, disposers, compactors, home laundry equipment, refrigerators and freezers, dehumidifiers, ranges and microwave ovens.

Sears' Motion to Dismiss

Sears prefaced its Proposed Findings of Fact and Conclusions of Law with a Motion to Dismiss the Complaint. The motion to dismiss is denied.

Sears' Affirmative Defenses

In its answer to the Commission's complaint, Sears raised four affirmative defenses, as noted in the Preliminary Statement to this decision. These affirmative defenses were first addressed in the pretrial Order of March 10, 1978, in which Sears' second and fourth affirmative defenses were ruled as raising issues irrelevant to this proceeding. Sears' findings (RPF 198-202) and argument (RB, pp. 56-63) on these affirmative defenses fails to show that they have any validity. They are without merit and are rejected (see also CRB, pp. 28-36, 38).

Conclusions

1. The Federal Trade Commission has jurisdiction over Sears, Roebuck and Co. and over its acts and practices in the advertising, promotion, marketing and sale of dishwashers.

2. Sears, Roebuck and Co. at all times relevant hereto has been engaged in commerce as defined in the Federal Trade Commission Act and has been and now is in substantial competition in commerce with corporations, firms, and individuals in the sale of dishwashers.

3. Sears, Roebuck and Co. has disseminated false, unfair, misleading and deceptive advertisements in the promotion, marketing and sale of dishwashers. [85]

4. Sears, Roebuck and Co. has engaged in unfair and deceptive acts and practices, and unfair methods of competition, by disseminating advertisements making material representations and affirmative product claims without having a reasonable basis, and without having substantiation for such representations and claims.

5. The dissemination by Sears, Roebuck and Co. of false, misleading and deceptive advertisements has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said advertisements were and are true and into the purchase of substantial numbers of Sears' dishwashers by reason of said erroneous and mistaken belief.

6. The dissemination by Sears, Roebuck and Co. of false, misleading and deceptive advertisements, and the making of material representations and affirmative product claims without a reasonable basis and without having substantiation, were and are all to the prejudice and injury of the public and of Sears, Roebuck and Co.'s competitors, and constituted and now constitute unfair and deceptive acts and practices in or affecting commerce, and unfair methods of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

7. This proceeding is in the public interest.

ORDER

I.

It is ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any Sears dishwasher will completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking, according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers. [86]

2. Representing, directly or by implication, that dishes in the top rack of any Sears dishwasher will get as clean as those on the bottom rack without prior rinsing or scraping.

3. Representing, directly or by implication, that any Sears dishwasher destroys all harmful and other bacteria and microorganisms on dishes, pots and pans.

It shall be an affirmative defense to a compliance action brought under the preceding paragraphs for Sears, Roebuck and Co. to establish that the representation is truthful.

II.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Making any statements or representations, directly or by implication, concerning the performance of such products unless such statements or representations are true and unless, at the time the statements or representations are made, Sears, Roebuck and Co. possesses and relies on a reasonable basis for such statements or representations, which shall consist of competent and reliable tests, as defined in the next paragraph, or other competent and reliable evidence which substantiates such statements or representations. [87]

(b) For purposes of this order, a competent and reliable test is one in which persons with skill and expert knowledge in the field conduct the test and evaluate its results in an objective manner using testing procedures which insure accurate and reliable results. Such tests must be truly and fully representative of expectable consumer usage.

2. Misrepresenting in connection with the advertisement of any such products or in any other manner, directly or by implication, the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research.

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such products which are inconsistent in any material respect with any statements or representations contained directly or by implication in post purchase material(s) supplied to the purchasers of such products.

4. For purposes of this order, the term "major home appliance" includes air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, freezers, ranges, microwave ovens, humidifiers, dehumidifiers, and any other product that falls into the category of major home appliances.

III.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, [88]representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers or other "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

(a) Of all materials which were relied upon in making any claim or representation in advertising, sales materials, promotional materials, or post purchase materials, concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances;

(b) Of all matter in their possession which contradicts, qualifies or calls into question any claim or representation in advertising, sales materials, promotional materials, or post purchase materials disseminated by Sears, Roebuck and Co., or by any advertising agency on behalf of Sears, Roebuck and Co., concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances.

Such records shall be retained by Sears, Roebuck and Co. for a period of three years from the date such advertising, sales materials, promotional materials, or post purchase materials were last disseminated. Such records may be inspected by the staff of the Commission upon reasonable notice.

IV.

It is further ordered, That Sears, Roebuck and Co. shall notify the Commission at least 30 days prior to the effective date of any proposed change in it as a corporate respondent such as dissolution, assignment or sale resulting in the emergence of a [89]successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That Sears, Roebuck and Co. shall forthwith distribute a copy of this order to each of its operating divisions, and to each of its officers, agents, representatives and employees, engaged in or connected with the preparation and placement of advertisements for dishwashers or other major home appliances.

It is further ordered, That Sears, Roebuck and Co. shall within sixty (60) days after service upon it of this order, and at such other times as the Commission may require, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

The following charts contain the results of the D&M Center tests on the Sears dishwasher, which are recorded in CX 83Z007 - CX 83Z012:

WASHING RESULTS OF D&M CENTER TESTS

CX - 882007

Date	Food	Pot	Oven or Stove	Cooking Method Temp.	Cooking Method Time	Wash Cycle	Washing Results (% Clean)
9/1/72	Eggs	SSS	Stove	#6	4 Min.	Normal	"retained soil"
	Eggs	SSS	Stove	#6	3 Min.	Normal	"retained soil"
	Eggs	AS	Stove	#7	4 Min.	Normal	100%
	Eggs	AS	Stove	#7	3 Min.	Normal	100%
	Cake	Cake Dish	Oven	325°	35 Min.	Normal	"clean"
	Pork & Beans	Cas. Dish	Oven	400°	40 Min.	Normal	"clean"
9/5/72	Eggs	AS	Stove	#8	2 Min.	Normal	"clean"
	Eggs	AS	Stove	#8	2 Min.	Normal	"clean"
	Eggs	SSS	Stove	#6	4 Min.	Normal	"retained soil"
	Eggs	SSS	Stove	#6	3 Min.	Normal	"retained soil"
	Pork & Beans[1]	Cas. Dish	Oven	325°	40 Min.	Normal	"clean"
9/6/72	Eggs	AS	Stove	#4	4½ Min.	Normal (in upper rack)	50-75%
	Eggs	AS	Stove	#4	4½ Min.	Normal (in lower rack)	75%
	Eggs	SSS	Stove	#4	4½ Min.	Normal (in upper rack)	25-50%
	Eggs	SSS	Stove	#3	7 Min.	Normal (in lower rack)	25%
	Pork & Beans	Cas. Dish	Oven	325°	55 Min.	Normal	96%
	Eggs	AS	Stove	#4	7 Min.	Normal (in lower rack)	95%
	Eggs	AS	Stove	#7	1 Min.	Normal (in upper rack)	25-50%
	Eggs	SSS	Stove	#4	N.R.	Normal	75%
	Eggs	SSS	Stove	#3	12 Min.	Normal	50-75%
	Potatoes	Cas. Dish	Oven	350°	45 Min.	Normal	"clean"
	Macaroni	Cas. Dish	Oven	350°	35 Min.	Normal	"clean"
	Macaroni	Cas. Dish	Oven	350°	60 Min.	Normal	Film on Bottom
9/7/72	Eggs	AS	Stove	#4	3 Min.	Normal	99%
	Eggs	AS	Stove	#4	2 Min.	Normal	100%
	Eggs	SSS	Stove	#3	2 Min.	Normal	75%
	Eggs	SSS	Stove	#3	2 Min.	Normal	85%
	Pork & Beans[2]	Cas. Dish	Oven	325°	45 Min.	Normal	only burned on soil retained
	Cake	Cake Dish	Oven	325°	45 Min.	Normal (in upper rack)	25-50%
	Cake	Cake Dish	Oven	325°	35 Min.	Normal (in lower rack)	"mark" retained
9/8/72	Eggs	AS	Stove	#4	4 Min.	Normal (in lower rack)	85%
	Eggs	AS	Stove	#4	N.R.	Normal (in upper rack)	100%
	Eggs	SSS	Stove	#4	4 Min.	Normal (in lower rack)	75%
	Eggs	SSS	Stove	#4	10 Min.	Normal (in upper rack)	50%
	Pork & Beans	Cas. Dish	Oven	350°	2 Hrs. 20 Min.	Normal	"clean"

WASHING RESULTS OF D&M CENTER TESTS

CX - 833008

Date	Food	Pot	Oven or Stove	Cooking Method Temp.	Cooking Method Time	Wash Cycle	Washing Results (% Clean)
9/11/72	Eggs	AS	Stove	#4	7 Min.	Normal (in upper rack)	retained on upper edge
	Eggs	AS	Stove	#4	7 Min.	Normal (in lower rack)	very little retained
	Eggs	SSS	Stove	#4	7 Min.	Normal (in upper rack)	50%
	Eggs	SSS	Stove	#3	3½ Min.	Normal (in lower rack)	25%
	Cake	Cas. Dish	Oven	325°	35 Min.	Normal (in upper rack)	25%
	Cake	Cas. Dish	Oven	325°	35 Min.	Normal (in lower rack)	60–75%
	Macaroni	Cas. Dish	Oven	325°	60 Min.	Normal (in upper rack)	starch particles retained
	Macaroni	Cas. Dish	Oven	325°	60 Min.	Normal (in lower rack)	"almost clean"
9/12/72	Cream of Rice	AS	Oven	350°	10 Min.	Normal)	clean except for film
	Cream of Rice	AS	Oven	350°	10 Min.	Normal)	
	Cream of Rice	Cas. Dish	Oven	350°	10 Min.	Normal)	clean except for film
	Cream of Rice	Cas. Dish	Oven	350°	10 Min.	Normal)	
	Cheese Sauce	Skillet	Stove	#4	6 Min.	Normal (one wash)	"almost clean"
	Cheese Sauce	Cas. Dish	Stove	#4	6 Min.	Normal (one wash)	"almost clean"
	Macaroni	Cas. Dish	Oven	N.R.	30 Min.	Normal	some starch retained
9/13/72	Eggs	AS	not cooked in pot			Normal	clean
	Eggs	SSS	not cooked in pot			Normal (in upper rack)	4 particles retained
	Eggs	SSS	Not cooked in pot			Normal (in lower rack)	2 particles retained
	Macaroni	N.R.	N.R.	N.R.	N.R.	Normal	4 particles retained
	Macaroni	N.R.	N.R.	N.R.	N.R.	Normal	17 particles retained
	Oatmeal	Cas. Dish	N.R.	N.R.	N.R.	Normal	film over 75%
9/14/72	Macaroni[3]	Cas. Dish	Oven	350°	45 Min.	Normal (3 washes)	"clean"
	Macaroni[3]	Cas. Dish	Oven	250[4]	40 Min.	Normal 3 washes: 4 washes:	 75% 90%

WASHING RESULTS OF D&M CENTER TESTS

CX - 832009

			Oven or	Cooking Method		Wash	Washing Results
Date	Food	Pot	Stove	Temp.	Time	Cycle	(% Clean)
9/15/72	Eggs	AS	Stove	#4	6 Min.	Normal	clean
	Eggs	SSS	Stove	#4	8 Min.	Normal	residue on sides
	Eggs	AS	Stove	#4	10 Min.	Normal	90%
	Eggs	SSS	Stove	#4	10 Min.	Normal	60%
	Cake	Cake Dish	Oven	350°	10 Min.	Normal (in lower rack)	85%
	Cake	Cake Dish	Oven	350°	10 Min.	Normal (in upper rack)	75%
9/18/72	Eggs	AS	Stove	#4	6 Min.	Normal (1 wash)	95%
	Eggs[4]	As	Stove	#4	6 Min.	Normal (1 wash)	95%
	Eggs	SSS	Stove	#4	8 Min.	Normal (1 wash)	70%
	Eggs[4]	SSS	Stove	#4	8 Min.	Normal (1 wash)	60%
	Macaroni	Cass. Dish	Oven	350°	45 Min.	Normal (1 wash)	80%
	Macaroni[4]	Cass. Dish	Oven	350°	45 Min.	Normal (1 wash)	60%
	Cake	Cake Dish	Oven	350°	10 Min.	Normal (1 wash)	75%
	Cake[4]	Cake Dish	Oven	350°	10 Min.	Normal (1 wash)	80%
	Eggs	AS	Stove	#4	6 Min.	Normal (2 washes)	100%
	Eggs[4]	AS	Stove	#4	6 Min.	Normal (2 washes)	100%
	Eggs	SSS	Stove	#4	8 Min.	Normal (2 washes)	mostly clean
	Eggs[4]	SSS	Stove	#4	8 Min.	Normal (2 washes)	N.R.
	Macaroni	Cass. Dish	Oven	350°	45 Min.	Normal (2 washes)	99%
	Macaroni[4]	Cass. Dish	Oven	350°	45 Min.	Normal (2 washes)	75%
	Cake	Cake Dish	Oven	350°	10 Min.	Normal (2 washes)	85%
	Cake[4]	Cake Dish	Oven	350°	10 Min.	Normal (2 washes)	N.R.
9/19/72	Oatmeal	Aluminum Sauce Pan	Stove	N.R.	30 Min.	Normal (1 cycle)	50%
	Rice	Cass. Dish	N.R.	N.R.	N.R.	Normal (1 cycle)	70%
	Eggs	N.R.	N.R.	N.R.	N.R.	Normal (1 cycle)	98%
	Rice	Skillet	N.R.	N.R.	N.R.	Normal (1 cycle)	90%

WASHING RESULTS OF D&M CENTER TESTS

CX - 88Z010

Date	Food	Pot	Oven or Stove	Cooking Method Temp.	Cooking Method Time	Wash Cycle	Washing Results (% Clean)
						For each test:	
8/4/73	Macaroni[5]	Cass. Dish	Oven	Lowest Setting	Until Dry	5 Min. Wash) 2 Min. Rinse)	100%
	Macaroni[3]	Cass. Dish	Oven	Lowest Setting	Until Dry	2 Min. Rinse) 20 Min. Wash)	100%
	Beefaroni[3]	Cass. Dish	Oven	Lowest Setting	Until Dry	2 Min. Rinse)	100%
8/9/73	Macaroni[5]	Cass. Dish	Oven	350°	45 Min.	20 Min. Wash)	film retained
	Beefaroni[5]	Cass. Dish	Oven	350°	45 Min.	20 Min. Wash)	100%
9/26/73	Macaroni	Cass. Dish	Oven	350°	50 Min.	20 Min. Wash	100%
	Macaroni	Cass. Dish	Oven	350°	40 Min.	20 Min. Wash	100%
	Macaroni	Cass. Dish	Oven	350°	50 Min.	20 Min. Wash	100%

Abbreviations

AS - Aluminum Skillet
SSS - Stainless Steel Skillet
N.R. - Not Recorded

Cass. Dish - Pyrex Casserole Dish
Temp. - Cooking Temperature;
# refers to stove setting from
#1 (low) to #8 (high)

Footnotes: All tests allowed pots to stand for two hours after baking and before placing in dishwasher, except those footnoted:

1. Casserole dish with pork and beans allowed to stand one hour and 20 minutes after baking and before placing in dishwasher.

2. Casserole dish with pork and beans allowed to stand 24 hours after baking and before placing in dishwasher.

3. Casserole dishes with macaroni and cheese allowed to stand 24 hours before placing in dishwasher

4. Each of these tests involved allowing the pots to stand for 24 hours before placing in dishwasher.

5. Each of these tests involved allowing the casserole dishes to stand for 36 hours before placing in dishwasher.

From October 6, 1972, to October 25, 1972, tests run at D&M Center involved the following food having been prepared as follows:

Cake – In cake dish; in oven; at 325°; 40 minutes.

Macaroni – In casserole dish; in oven; at 350°; 40 minutes.

Oatmeal – In aluminum sauce pan; on stove; at #8 setting for 2 minutes, then #4 setting for 20 minutes.

Egg Omelet – In aluminum skillet; on stove; at #4 setting; 10 minutes.

The results of these tests are as follows:

WASHING RESULTS OF D&M CENTER TESTS

CX - 83Z011

Date	Wash Cycle	Wash Results (% Clean) Cake	Macaroni	Oatmeal	Omelet
10/6/72	5 Min.	15%	10%	2%	90%
	10 Min.	30%	25%	15%	95%
	15 Min.	35%	30%	20%	95%
	20 Min.	40%	55%	30%	95%
	25 Min.	45%	65%	45%	95%
	30 Min.	50%	70%	50%	95%
	35 Min.	60%	70%	70%	98%
	3 Min.	75%	80%	80%	N.R.
	5 Min.	75%	80%	80%	95%
	10 Min.	85%	80%	85%	98%
	15 Min.	90%	85%	90%	95%
	20 Min.	90%	85%	90%	95%
	25 Min.	90%	85%	90%	95%
10/9/72	35 Min. Wash	50%	75%	50%	15%
	3 Min. Rinse	55%	80%	60%	20%
	3 Min. Rinse	60%	85%	65%	25%
	25 Min. Wash	95%	95%	95%	40%
10/10/72	20 Min.	Film	65%	30%	90%
10/11/72	30 Min.	35%	70%	95%	90%
	10 Min.	15%	25%	30%	80%
10/12/72	15 Min.	50%	50%	35%	80%
	20 Min.	Not Tested	65%	Not Tested	90%
10/13/72	25 Min.	90%	55%	35%	85%
10/16/72	20 Min. Wash)				
	3 Min. Rinse)				
	3 Min. Rinse)				
	20 Min. Wash)	75%	65%	98%	100%
	3 Min. Rinse)				
	3 Min. Rinse)				
10/17/72	20 Min. Wash)				
	3 Min. Rinse)				
	3 Min. Rinse)				
	20 Min. Wash)	90%	75%	98%	90%
	3 Min. Rinse)				
	3 Min. Rinse)				
	Normal Cycle	80%	70%	98%	95%
10/18/72	Normal Cycle	80%	50%	80%	98%
10/19/72	20 Min. Wash)				
	3 Min. Rinse)				
	3 Min. Rinse)				
	20 Min. Wash)	85%	85%	90%	95%
	3 Min. Rinse)				
	3 Min. Rinse)				
	Normal Cycle	40%	40%	65%	80%

WASHING RESULTS OF D&M CENTER TESTS

CX - 332012

		Wash Results (% Clean)			
Date	Wash Cycle	Cake	Macaroni	Oatmeal	Omelet
10/20/72	Normal Cycle	Not Tested	75%	Not Tested	Not Tested
10/23/72	Normal Cycle	Not Tested	65%	Not Tested	Not Tested
10/24/72	Normal Cycle	Not Tested	75%	Not Tested	Not Tested
10/26/72	20 Min. Wash) 3½ Min. Rinse) 3½ Min. Rinse) 8 Min. Wash) 4 Min. Rinse) 5 Min. Rinse)	Not Tested	65%	Not Tested	Not Tested
10/27/72	8 Min. Wash) 3½ Min. Rinse) 3½ Min. Rinse) 20 Min. Wash) 4 Min. Rinse) 5 Min. Rinse)	Not Tested	"No Retained Soil"	Not Tested	Not Tested

APPENDIX B

QUALIFICATIONS OF WITNESSES

Patty J. Annis

Patty J. Annis is an Assistant Professor of Household Equipment in the Department of Family Economics at Kansas State University, where she is responsible for all of the household equipment courses taught in the Department of Family Economics (Annis, Tr. 2246, 2248; CX 289A). She is currently in charge of the Home Management Program at Kansas State (Annis, Tr. 2249–50). She has a B.S. degree in Home Economics from Mississippi State College for Women and an M.S. degree from the University of Tennessee (CX 289A; Annis, Tr. 2248). Her field specialization is inside air contamination control (Annis, Tr. 2250–52; CX 289A). Professor Annis has experience in the use, testing and analysis procedures with regard to basic household equipment including dishwashers and their performance vis-a-vis different types of food soils (Annis, Tr. 2254–56, 2260–63, 2265–67). She has taught courses and done work in areas dealing with industry standards for appliances such as dishwashers (Annis, 2256–57). Professor Annis is a member of College Educators in Home Equipment, the ASTM Committee on Vacuum Cleaners and the American Home Economics Association (CX 289A; Annis, 2253–54).

James L. Brown

Mr. Brown is currently Managing Director of Customer Services of the National Sanitation Foundation ("NSF") in Ann Arbor, Michigan (Brown, Tr. 2814, 2817; CX 290A). The National Sanitation Foundation is a non-profit organization which works with industry, user groups and regulatory agencies in the development of standards for food service equipment, including commercial spray-type dishwashers, and in the evaluation of that equipment (CX 302–305, 319; Brown, Tr. 2814–16). Mr. Brown's Customer Services group evaluates and tests dishwashers in manufacturers' plants, participates in coordinating tests for dishwashers in the NSF laboratory, and works in developing test procedures for such testing (Brown, Tr. 2819). Mr. Brown is also Resident

Lecturer on Environmental Health at the University of Michigan School of Public Health, covering sanitization and commercial dishwashers in the graduate courses he teaches (Brown, Tr. 2842–44; CX 290A). Mr. Brown holds a B.S. degree from the University of Toledo and a Masters of Public Health degree from the University of Michigan; his coursework included identifying the numbers and kinds of microorganisms on surfaces, thermal destruction of microorganisms and proper laboratory procedure (Brown, Tr. 2826–27). In his experience as a field sanitarian and supervisor, Mr. Brown has evaluated dishwashers for their ability to sanitize dishes; while at NSF, he has evaluated commercial dishwashers which are very similar in their design to home-type dishwashers (Brown, Tr. 2827–30). He has been involved with setting standards for commercial dishwashing machines since 1964 and did much of the laboratory work for the 1964 NSF study (CX 300) on commercial dishwashers (Brown, Tr. 2831–32; CX 290B). Mr. Brown has authored several publications including one entitled, "Mechanical Dishwashing" (CX 309), which is used to train sanitarians in the field evaluation of dishwashers (Brown, Tr. 2841–42; CX 290B). He is a member of several professional organizations including the Intersociety Academy for the Certification of Sanitarians and the American Public Health Association (Brown, Tr. 2844–46; CX 290A).

Dr. Frank L. Bryan

Dr. Bryan is currently the Chief of Foodborne Disease, Bureau of Training, at the Center for Disease Control in Atlanta, Georgia (Dr. Bryan, Tr. 2592; CX 296A). The Center for Disease Control, an agency of the U.S. Department of Health, Education and Welfare, has primary responsibility for disease surveillance throughout the country, laboratory support to the states, and demonstration and training of disease control (Dr. Bryan, Tr. 2592). Dr. Bryan received his B.S. degree from Indiana University, majoring in Public Health, and his Masters of Public Health degree from the University of Michigan (CX 296H). He obtained his Ph.D. degree at Iowa State University, majoring in Bacteriology with a minor in Food Technology (CX 296G). Since working at the Center for Disease Control, Dr. Bryan has conducted a major study on the evaluation of home-type dishwashers for use in small institutions (Dr. Bryan, Tr. 2598–2606; CX 296E). This study was published in 1975 (CX 307). He has held training sessions in which he dealt with dishwashers (Dr. Bryan, Tr. 2626). Dr. Bryan has also done work involving the thermal destruction of microorganisms and has had to assess the presence, numbers and kinds of microorganisms on foods and surfaces (Dr. Bryan, Tr. 2596–97, 2626–27). Dr. Bryan is one of five representatives from the United States who sit on the 21 member International Commission on Microbiological Specifications for Foods (Dr. Bryan, Tr. 2628–29; CX 296K). He is a member of, and frequently has served as an officer on, numerous other professional organizations and committees, including the American Society for Microbiology, Institute of Food Technologists, International Association of Milk, Food and Environmental Sanitarians, American Public Health Association, New York Academy of Sciences, Sigma Xi-Scientific Research Society of North America, and the National Association of Environmental Health (CX 296 J–K). Dr. Bryan has authored numerous publications dealing with foodborne diseases, pathogenic microorganisms, and their thermal destruction (Dr. Bryan, Tr. 2629–2636; CX 296 B–F).

Shari Bryant

Ms. Bryant is a free-lance home economist specializing in consumer affairs; her clients have included corporations, advertising agencies, financial institutions and public relations firms (RX 128, p. 2; Bryant, Tr. 4028, 4030). Her previous positions were as the Director of Household Finance Corporation's Money Management Institute, Manager of Wilson Food Company's Home Service Department, food lecturer and cooking school director for Rural Gravure Publications, and staff home economist with Smith Bucklin Trade Association Management Firm (RX 128, p. 2; Bryant, Tr. 4010–27). Ms. Bryant has a B.S. degree in Home Economics from Northern Illinois University (RX 128, p. 2; Bryant, Tr. 4004). She has been a member of various professional societies, including the American Home Economics Association, Grocery Manufacturers of America, and Chicago Better Business Bureau (RX 128, pp. 2–3; Bryant, Tr. 4038–43). Ms. Bryant has general experience in food preparation procedures, consumer use of dishwashers, and normal kitchen practices (RX 128, p. 2; Bryant, Tr. 4005–09, 4012–14, 4016–19, 4022, 4033, 4037–38).

Dr. Patricia Charache

Dr. Charache holds numerous current appointments at Johns Hopkins University School of Medicine and Johns Hopkins Hospital, including the following positions among others: Associate Professor of Laboratory Medicine and Director of the Microbiology Division of the Departments of Pathology; Associate Professor of Medicine, Member of the Infectious Disease Division; Director of the Microbiology Laboratories; and Chairperson of the Committee on Infection Control (CX 365A). Dr. Charache is extensively involved in the areas of medical microbiology, disease prevention and identification, infection control, and patient care in her multiple capacities as teacher, researcher, staff and laboratory supervisor, hospital physician, and member or head of various medical school and hospital committees and departments (Dr. Charache, Tr. 6047–53). As Director of the Microbiology Division of the Department of Pathology, she has 55 full-time people under her supervision (Dr. Charache, Tr. 6047–48). Prior to her present position, Dr. Charache was a Research Associate at Harvard Medical School and Children's Hospital in Boston, where she studied immunology responses and infection control in patients; she has also served as Assistant Chief of Medicine for the Baltimore City Hospitals (CX 365B; Dr. Charache, Tr. 6054–55). Her areas of specialty are in infectious disease, medical microbiology, and epidemiology as it pertains to infection control, epidemiology, smoking, etc. (Dr. Charache, Tr. 6055). Dr. Charache graduated from New York University School of Medicine, where she received various honors and awards for academic excellence (Dr. Charache, Tr. 6055–57). She also has received other honors, awards and fellowships which demonstrate her achievement in the medical profession (CX 365B, C; Dr. Charache, Tr. 6057–61, 6072). Dr. Charache is a member of numerous honorary and professional societies, such as the American Society for Microbiology, American Association for the Advancement of Science, American College for Clinical Pharmacology, and Infectious Diseases Society of America, among others (CX 365C; Dr. Charache, Tr. 6061–67). She has served as a consultant to NIH's Board of Scientific Counselors for the National Institute for Allergy and Infectious Diseases (CX 365C; Dr. Charache, Tr. 6067–68). She presently serves as a consultant to the U.S. Department of Defense's Ad Hoc Study Group on Bacterial and Mycotic Diseases, as well as to other organizations (CX 365C; Dr. Charache, Tr. 6068–70). Dr. Charache has had numerous editorial appointments and has written many published articles and books (CX 365C–H; Dr. Charache, Tr. 6070–73). Finally, Dr. Charache has done work involving sterilization procedures, thermal destruction of microorganisms, bacterial spores, botulism, sanitization procedures, and the susceptibility of infants to various diseases (Dr. Charache, Tr. 6075–78).

Anthony Eberwein

Mr. Eberwein is presently president of Installations by Anthony, Inc., in southern Florida, a company which installs home appliances and provides consulting services to consumers and builders (Eberwein, Tr. 950). Previously, he worked for Canadian General Electric Co. ("CGE" from 1954–1964), holding several successive positions as a Field Service Technician, District Product Service Trainer, and National Service Trainer. In this last capacity, he assisted in writing the service manuals for CGE personnel and servicing dealers, the installation instructions for major appliances, and the customer user books for the products manufactured in Canada (Eberwein, Tr. 954, 956–57; CX 318A). From 1964 to 1975, he worked for General Electric Co. in the United States, holding successive positions as a Field Service Technician, Engineering Laboratory Technician and Dishwasher Performance Specialist (Eberwein, Tr. 957–63; CX 318A–B). Throughout his career, Mr. Eberwein has spent extensive amounts of time working with and testing dishwashers (Eberwein, Tr. 952–55; 959–63; CX 318A–B). He has also contributed towards establishing wash performance standards in the dishwasher industry (Eberwein, Tr. 963). Mr. Eberwein works with and is familiar with the mechanical design and operation of Sears' dishwashers, including the Lady Kenmore model (Eberwein, Tr. 952–53).

Virginia B. Ferguson

Virginia Ferguson is a Research Consultant in the Food and Agribusiness Section of Arthur D. Little in Cambridge, Massachusetts (Ferguson, Tr. 1654; CX 292A). Arthur D. Little is an independent research organization (Sullivan, Tr. 1403–04). Prior to that position, she worked as a Food Chemist at the Foods Research Laboratory, Inc. (CX 292A; Ferguson, Tr. 1657). Ms. Ferguson received her B.S. degree in Education, majoring in Foods and Nutrition, from Framingham State College, and her M.S. degree in Foods and Nutrition from Cornell University (CX 292A; Ferguson, Tr. 1658–59). Her experience is in the areas of analytical testing and evaluation of food products, flavor evaluation, product development, development of test designs and procedures for the evaluation of food products and as substantiation for food advertising claims, and adhered food soils (Ferguson, Tr. 1657–58, 1660–61, 1669–70; CX 292A). Ms. Ferguson is a member of the Institute of Food Technologists and a former Secretary for the Northeast Section. She is also a member of the Institute's Sensory Evaluation Division and the Massachusetts Home Economics Association (CX 292A; Ferguson, Tr. 1655–56).

Barbara J. Fraser

Ms. Fraser has been employed by Design and Manufacturing Corporation ("D&M"), the maker of Sears' dishwashers, since 1969, initially starting out as a laboratory technician doing some work in chemistry and gradually assuming duties as a technician in the engineering field (Fraser, Tr. 5080). Since 1976, she has been employed in D&M's Engineering Department as an engineer (Fraser, Tr. 5080). Ms. Fraser has a B.S. degree in Electrical Engineering from Purdue University (Fraser, Tr. 5081). At D&M, her functions and duties have included testing Sears' and competitors' dishwashers, designing tests, doing research on wash systems and in other areas, and designing cycles for dishwashers (Fraser, Tr. 5080–82). At one point, while still a technician, she was put in charge of a dishwasher testing group at D&M (Fraser, Tr. 5084).

Dr. Glyn J. Godwin

Dr. Godwin received his B.S. and M.S. degrees in Microbiology from Southeastern Louisiana University, and has a Ph.D. degree in Food Science from Louisiana State University (CX 293A). In the past, he was Assistant Professor of Food Microbiology and Toxicology at the University of Rhode Island, during which time he also served as food science expert for the State of Rhode Island (CX 293A; Dr. Godwin, Tr. 2029–30). He is a Registered Food, Dairy, Industrial, Agricultural and Sanitation Microbiologist (CX 293A; Dr. Godwin, Tr. 2035–36). During the course of his work, Dr. Godwin focused on food processing and food microbiological problems for the food processing industry within Rhode Island (Dr. Godwin, Tr. 2029–31), and designed and conducted scientific experiments associated with foods (Dr. Godwin, Tr. 2039). He has authored articles on food processing, canning and food safety and has taught university courses on the same subjects (CX 293B). Dr. Godwin is a member of the Institute of Food Technologists belonging to its Division of Quality Assurance and Division of Food Microbiology. He is also a member of the American Society for Microbiology as well as a member of various honorary societies (CX 293A–B; Dr. Godwin, Tr. 2031–34).

Dr. Harold H. Kassaijian

Dr. Kassaijian has been a Professor at the Graduate School of Management at UCLA since 1961, and has taught courses in consumer behavior, marketing, mass communications, statistics, advertising, market research and research methodology (CX 294A, Dr. Kassaijian, Tr. 1798–99). Dr. Kassarjian has also conducted numerous research studies for individuals, government and industry on topics such as politics, product testing, attitude and opinion research, media research, and many aspects of marketing and consumer behavior (Dr. Kassaijian, Tr. 1799–1800; CX 294A). He has served as a consultant to local, state and federal government, industry, and groups such as the National Science Foundation and the Public Broadcasting Service (CX 294A–B; Dr. Kassaijian, Tr. 1802–04). Dr. Kassaijian received his B.A., M.A. and Ph.D. degrees in psychology from UCLA, and is a licensed California psychologist (CX 294A). He has been President of the Pacific Chapter of the American Association for Public Opinion Research from 1969–1970 and a member of their Standards and Ethics Committee on the national level in 1975. He served as President in 1977 of the Association for Consumer Reserarch. Dr. Kassaijian is also a member of the American Psychological Association, American Marketing Association and American Statistical Association (CX 294B; Dr. Kassaijian, Tr. 1800–01). In 1972, he was elected as a Fellow of the American Psychological Association and, in a 1975 opinion poll of marketing educators throughout the country, Dr. Kassaijian was selected as among the top 12 leaders in marketing (Dr. Kassaijian, Tr. 1808–09; CX 294C). Dr. Kassaijian serves as an Academic Editor for West Publishing Company, where he appraises the quality of marketing and consumer research manuscripts submitted for publication (CX 294B; Dr. Kassaijian, Tr. 1806). He has also been, or still is, a member of the editorial board or reviewer for the Journal of Marketing (1970–1976), Journal of Consumer Affairs (1971–1974), Journal of Advertising (1975-present), Journal of Applied Psychology (1976), Journal of Business Research (1976-present), and the Journal of Consumer Research (1973-present); consequently Dr. Kassaijian has reviewed and made recommendations on hundreds of consumer research articles (CX 294B; Dr. Kassaijian, Tr. 1804–06). Dr. Kassaijian has also authored numerous books and articles in the field of consumer research (CX 294C–I; Dr. Kassaijian, Tr. 1809–13).

Dr. Renny S. Norman

Dr. Norman is Engineering Advisor in the Engineering Division of Illinois Institute of Technology Research Institute ("IIT") in Chicago (RX 127, p. 3; Dr. Norman, Tr. 3154). The Research Institute is a not-for-profit research organization associated with the Illinois Institute of Technology and performs contract research and development programs for government and industry (Dr. Norman, Tr. 3180–81). He has been employed by IIT since 1966, except for the period September 1969 to September 1972, during which he was a full time graduate student (RX 127, p. 2; Dr. Norman, Tr. 3177–79). Prior to 1966, he was employed for five years as a propulsion research engineer at NASA's Lewis Research Center in Cleveland (RX 127, p. 2; Dr. Norman, Tr. 3175–77). Dr. Norman has a B.S. degree in Mechanical Engineering from Stanford University, an M.S. degree in Aeronautical Engineering from Purdue University, and a Ph.D. degree in Mechanical Engineering from IIT (RX 127, p. 2; Dr. Norman, Tr. 3166–67, 3169, 3173). He also studied experimental aerodynamics for one year in Belguim at a school sponsored by NATO (RX 127, p. 2; Dr. Norman, Tr. 3171–73). Upon joining IIT, Dr. Norman's initial responsibilities as an associate engineer included projects on aerodynamics and fluid mechanics (RX 127, p. 2; Dr. Norman, Tr. 3177–78). Subsequently, he has held successive positions at IIT as a Research Engineer, Senior Research Engineer, Manager of the Acoustics and Fluid Mechanics Section of the Engineering Mechanics Division and, presently, Engineering Advisor (RX 127, pp. 2–3; Dr. Norman, Tr. 3178–79). Since 1974, Dr. Norman has supervised a group of seven engineers in the areas of acoustics, fluid mechanics, product design, experimental measurements, and instrumentation design, in addition to his current supervisory duties as Engineering Advisor (RX 127, pp. 2–3; Dr. Norman, Tr. 3179–80). During his career, Dr. Norman has been extensively involved in designing test procedures, conducting tests, preparing test reports, and designing instrumentation (Dr. Norman, Tr. 3174, 3176–79, 3182–88).

Dr. Zakarias J. Ordal

Dr. Ordal is a Professor in the Department of Food Science and the Department of Microbiology at the University of Illinois, where he has been since 1949 (Dr. Ordal, Tr. 5579, 5585). Previously, he was on the staff of the University of Illinois College of Medicine and also worked in industry for a few years (Dr. Ordal, Tr. 5585, 5593). Since 1940, the positions that Dr. Ordal has held have always been in the fields of bacteriology and microbiology (Dr. Ordal, Tr. 5593–94). Dr. Ordal received his Ph.D degree in Bacteriology from the University of Minnesota (Dr. Ordal, Tr. 5592–93). During his teaching career, he has supervised graduate students and taught courses dealing with food and industrial microbiology, the destruction or reduction of bacterial populations through physical stresses such as heat, commercial canning, spores and organisms such as botulism, and the principles of sanitation in the food processing industry (Dr. Ordal, Tr. 5585–90). The areas in which Dr. Ordal has research interests include the following: bacterial spore activation, germination and outgrowth (breaking the dormancy or resistant state of the spore); injury and recovery of bacterial cells; sporulation (the process through which a vegetative cell is converted to a spore); physiology of bacterial spores; and bacterial swab testing (Dr. Ordal, Tr. 5580–85, 5591). His memberships in professional organizations include the American Academy for Microbiology, Institute of Food Technologists, and Association of Milk, Food and Dairy Sanitarians (Dr. Ordal, Tr. 5594–95). He has been involved in activities under the aegis of the National Research Council of the National Academy of Sciences, Department of Defense, Department of Health, Education and Welfare, and Food and Drug Administration (Dr. Ordal, Tr. 5595–

96). Dr. Ordal is the author of many scientific publications and has written several papers on the effects of physical stresses on bacterial cells (Dr. Ordal, Tr. 5580-85).

Frederick Sullivan

Frederick Sullivan is currently Senior Research Chemist and Project Director in the Food and Agribusiness Section of Arthur D. Little in Cambridge, Massachusetts, a company he has been with for 31 years. Arthur D. Little is an independent research organization (Sullivan, Tr. 1403-04; CX 295A). Mr. Sullivan has extensive experience in the scientific testing and evaluation of household products, dishwasher and commercial detergents, household appliances such as refrigerators and air conditioners, and food soils (CX 295A-B). He has participated in dishwasher experiments using commercial detergents (CX 295A). Mr. Sullivan has written several publications involving the testing of chemical substances (CX 295D-E). He is a member of the American Chemical Association, the Institute of Food Technologists, and the New England Council of the American Society for Testing Materials. He is past Chairman of the American Society for Testing and Materials Committee E-18 on Sensory Evaluation of Materials and Products (CX 295C).

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

This case involves a challenge to the advertising of various performance characteristics of home dishwashers. Complaint in the matter was issued on November 20, 1977, and charged Sears, Roebuck and Co. ("Sears"), and its advertising agency, J. Walter Thompson, with disseminating deceptive and unfair advertisements in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as part of a campaign to promote sales of the Lady Kenmore dishwasher. In particular, the complaint alleged that Sears and J. Walter Thompson had made the following claims, for which they lacked any reasonable basis:

1. the Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers; [2]
2. dishes in the top rack of the Lady Kenmore dishwasher will get as clean as those in the bottom rack without prior rinsing or scraping;
3. the Lady Kenmore "Sani-Wash" cycle, by giving dishes an "extra-hot 155 degree final rinse," destroys all harmful and other bacteria and microorganisms on the dishes and pots and pans.

The complaint also alleged that the first and third of the foregoing claims were false, as well as unsubstantiated, and that Sears had further violated Section 5 of the FTC Act by disseminating advertisements depicting a demonstration that was misrepresented as proving the truth of the claim that the Lady Kenmore eliminated the need for pre-rinsing and scraping of pots, pans, and dishes. Finally, the complaint charged that respondents had violated Section 5 of the FTC Act by disseminating a claim in their advertisements (that the Lady Kenmore eliminated the need for pre-rinsing and scraping) that was contradicted by instructions in the Lady Kenmore Owner's Manual. (I.D. p. 2)[1]

Following pre-trial proceedings, respondent J. Walter Thompson signed a consent agreement, and was removed from the adjudication. Hearings on the charges against respondent Sears were then held before Administrative Law Judge (ALJ) Daniel Hanscom, who entered an initial decision sustaining all allegations of the complaint, and recommended entry of an order prohibiting various misrepresentations and requiring that Sears maintain substantiation in the future for all advertisements of "major home appliances."

This matter is before the Commission upon an appeal by Sears from one of Judge Hanscom's findings of liability, and from several provisions of the order that he entered. Sears does not challenge the ALJ's finding that it misrepresented that the Lady Kenmore would eliminate the need for pre-rinsing or scraping of dishes, pots, and pans. Nor does Sears challenge the finding that it lacked substantiation for this claim, or [3]for the claim that dishes on the top rack would be cleaned as well as those on the bottom rack of the Lady Kenmore. (TROA 3) Sears does, however, contest the ALJ's finding that it misrepresented that the Lady Kenmore would sterilize dishes, and the ALJ's recommendation that Sears be required to maintain substantiation for all future advertisements of "major home appliances" as defined in the order. Our review of Sears' appeal follows.

I. Sani-Wash Issue

The Sears Lady Kenmore dishwasher comes equipped with a "Sani-Wash" cycle, that is designed to provide dishes with a 2 minute wash in water that has been heated to 155 degrees fahrenheit. The benefits of this feature were described by Sears in its advertising as follows:

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[1] The following abbreviations will be used in this opinion:

I.D.	-	Initial Decision, Finding No.
I.D. p.	-	Initial Decision, Page No.
Tr.	-	Transcript of Testimony, Page No.
CX	-	Complaint Counsel's Exhibit No.
RX	-	Respondent's Exhibit No.
TROA	-	Transcript of Oral Argument Before the Commission, Page No.

"SANI-WASH is her way of getting dishes hygienically clean. It gives your dishes a final rinse in 155° water. Which is especially nice for glasses and baby bottles. CX-3

The complaint alleged that messages of the foregoing sort implied to consumers that the Sani-Wash cycle would "sterilize" dishes in the clinical sense, that is, rid them of all living microorganisms and bacteria, harmful or otherwise.

Sears acknowledges that the Sani-Wash cycle will not "sterilize" dishes,[2] but it denies strenuously that its advertising implied that the Sani-Wash cycle would do this. It argues, rather, that the term "hygienically clean" means simply a state in which bacterial populations are reduced to levels that are universally recognized as safe from a public health perspective.

In rejecting this contention, Judge Hanscom focused upon the reference to "baby bottles" in Sears' advertising, observing that many consumers are likely to associate the sanitization of baby bottles with the process of boiling, [4]which consumers may assume results in sterilizing the bottles. (I.D. pp. 80–81) Sears' reply is that boiling baby bottles does not sterilize them, and that the Sani-Wash cycle is likely to do as much to reduce the bacterial population on a baby bottle as is boiling. (TROA 16)

A threshold question in this dispute is what message is conveyed by the claim that the Sani-Wash cycle will get dishes "hygienically clean." Judge Hanscom, upon review of the advertisements, concluded that the complaint had correctly alleged that such advertising represented that the Sani-Wash cycle would kill *all* microorganisms. Sears objects to this finding, and upon our own review, we agree with its objections.

It is well established that the Commission may rely upon the text of an advertisement itself to interpret the advertisement's meaning. *Carter Products, Inc.* v. *FTC*, 323 F.2d 523, 528 (5th Cir. 1963); *J.B. Williams Co., Inc.* v. *FTC*, 381 F.2d 884, 889 (6th Cir. 1967). Accordingly, Judge Hanscom did not err in turning to the text of the advertisements to discern what they represented. Unfortunately, the term "hygienically clean" appears rarely in common parlance. Sears observes that the term has been used by both the General Services Administration and the United States Department of Agriculture to refer to levels of sanitization short of complete sterilization. (RX 114-5; CX 248–B, E; Tr. 5427). Obviously, however, use of the term in publications not designed for general circulation can be at best of limited value in determining the message that such a term would convey when disseminated in mass advertising, especially when coupled with other references, such as those to baby bottles.

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[2] Sears' Appeal Brief, p. 10n. - While acknowledging that the time-temperature combination achieved by the Sani-Wash cycle will not guarantee sterilization in all cases, Sears suggests that it may achieve sterilization in some, depending upon the nature of the bacterial colonies present. The Sani-Wash cycle will not kill certain thermophiles and bacterial spores. (Tr. 2064–2068)

In response to this point, Sears observes that only a small number of the Sani-Wash advertisements referred to "baby bottles" and that even these spoke of Sani-Wash being especially nice for "*glasses* and baby bottles", thereby diluting the implied analogy to boiling.

It is hornbook law that where an advertisement is subject to two or more possible interpretations, an advertiser will be liable for the truth of each such possible meaning. *Rhodes Pharmacal Co., Inc.* v. *FTC,* 208 F.2d 382, 387 (7th Cir. 1953), *aff'd,* 348 U.S. 940 (1955). Before this principle may come into play, however, it must first be determined that an advertisement is reasonably subject to some interpretation that is false. In this respect we find the inferences urged by either side to be roughly equal in merit, or lack thereof, and that being so, Sears must prevail. [5]

The foregoing is not to say, however, that we find Sears' advertising of the Sani-Wash cycle to have been "hygienically clean" from a legal point of view. Sears' advertising was obviously designed to convey *some* health-related message to consumers. Sears contends that its ads represented simply that Sani-Wash would sanitize dishes to a degree deemed satisfactory from a public health perspective. (Gets dishes so clean you can eat off them!) There is no doubt that Sears' advertisements did convey *at least* this much, but the further clear inference to be drawn from the advertisements, we believe, is that the Sani-Wash cycle would provide a sanitation benefit significantly in excess of that afforded by the regular cycles of a dishwasher. This message is clearly conveyed by references to the Sani-cycle's "*extra-hot*" 155 degree rinse that leaves dishes "hygienically clean." The reference to a special feature, the extra-hot rinse, combined with use of an uncommon term "hygienically clean" to describe the result, would be likely to lead an average reader to conclude that the Sani-Wash cycle does, indeed, provide a health benefit that a dishwasher without an extra-hot sanitization cycle does not.

As to whether the foregoing representation is or is not true, or substantiated, the record is unclear, in part, no doubt, because this representation was not pleaded in the complaint as having been made by Sears, nor was the case tried on this basis. There is evidence to suggest that the regular wash cycle of a dishwasher will sanitize dishes to levels that are deemed satisfactory from a public health perspective, and that are practically indistinguishable from the level of sanitization achieved by Sani-Wash. (Tr. 2222-3) On the other hand, Sears contends that the Sani-Wash cycle *ensures* that sanitization will occur, by guaranteeing water temperatures at 155 degrees, while a dishwasher without a sanitization cycle could not in every case be *relied upon* to achieve a time-temperature combination sufficient to effect the requisite level of germ destruction. (TROA 9)[3]

To resolve this conflict, we might well, ordinarily, remand the case for receipt of further evidence, or at least further findings by the ALJ. Because Judge Hanscom construed Sears' advertising to promise sterilization, he did not evaluate the extensive testimony regarding the precise extent of sanitization benefits provided by the Lady Kenmore. Moreover, it is likely that the trial did not give Sears fair notice that it should defend the issue of the comparative benefits of the Sani-Wash cycle. (*See, e.g.*, I.D. 189; Tr. 5653, 5657, 5662) In this case, however, a remand would be inappropriate, because [6]the challenged claim has been halted and, more importantly, because Sears does not dispute that other evidence of record justifies entry of an order prohibiting at least false performance claims for dishwashers. Such an order would cover future representations regarding the sanitizing capabilities of the Lady Kenmore, if they are resumed.

II. Scope of the Order

A. Introduction

While we are unable to conclude that Sears misrepresented that its Lady Kenmore would sterilize dishes, the record leaves no doubt, and indeed, Sears does not contest, (TROA 3) that it did misrepresent the capabilities of the Lady Kenmore in two other highly significant respects. First, Sears claimed that the Lady Kenmore would eliminate the need for scraping or pre-rinsing all dishes, pots, and pans dirtied under circumstances normally encountered in the kitchen, and second, Sears represented that dishes on the top rack of the Lady Kenmore could be cleaned as thoroughly as those on the bottom. Both claims were unsubstantiated, and the first is shown by the record in this case to be false.

The claims in question were made as part of an effort by Sears, as described by its advertising agency, to

> transform the consumer image [of the Lady Kenmore] from a 'price' brand to a superior product at a reasonable price. Eventually, the brand should move from *market leadership* to *market dominance* as the market share increases. [CX 1422Z028, emphasis in original]

The strategy chosen to achieve this repositioning of the Lady Kenmore was to merchandise it as the "Freedom Maker," a dishwasher that would actually wash dishes, rather than simply rinse, remove trace elements of dirt from, and dry dishes that had already been scraped and pre-rinsed by a homemaker with better things to do. It hardly requires elaborate survey evidence (although the record is replete with it) to realize that a dishwasher that eliminates the need for pre-rinsing and scraping of dishes, pots, and pans, is likely to command the interest of large numbers of consumers, who will be willing to pay more for it because of that feature.[4] [7]Sears' advertising agency outlined the following rationale for its ad campaign:

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[3] Of course, if this is the principal added health benefit of Sani-Wash, it might have been far more accurately conveyed in Sears' advertising than it was.

> Among the leading dishwasher brands, there is a general level of product parity, with most brands claiming or implying a straight cleaning consumer benefit.
>
> The Sears Lady Kenmore Dishwasher positioning is *unique* because it is the only brand strongly claiming convenience with effective cleaning. It gains additional strength because it is based on two of the most important product features: no scraping, no pre-rinsing. [CX 142Z029, emphasis in original]

In order to establish Lady Kenmore as the convenience dishwasher, the "Freedom Maker," Sears disseminated such messages as the following:

> SEARS LADY KENMORE. THE DO-IT-ITSELF DISHWASHER. No scraping. No pre-rinsing. Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off. And the dishes on top get as clean as those on the bottom. [CX-1, emphasis in original]

Another commercial depicted a hopelessly unliberated husband, his wife away from home, awash in a sea of dirty dishes. To the rescue, Lady Kenmore:

> Now's the time to really clean up during Sears gigantic dishwasher sale. With a Kenmore you'll never have to scrape or rinse again. Even dishes *crusty* with leftover food. Kenmore's 14 powerful hot water jets scour every dish clean. . .with no scraping or rinsing. Make your dish happy. . . . [CX-5, emphasis in original]

The theme that Sears Lady Kenmore would eliminate the need for pre-rinsing and scraping was maintained in Sears advertising on a widespread basis for three to four years, from sometime in 1971 to sometime in 1975 (CX 62-77), with roughly $8 million spent on this promotional effort, in both national and local markets, in print and broadcast media. Altogether, the record contains more than 50 distinct advertisements in which this theme was repeated. (CX 1-CX 54) The record also reveals that Sears' efforts to distinguish the Lady Kenmore as the dishwasher that would eliminate the need for pre-rinsing or pre-scraping coincided with a dramatic rise in the good Lady's market share. [8]Sears increased its share of the dishwasher market from 26% in 1971 to 29% through August 1973 (CX 151C), and sales of the Lady Kenmore increased from 35,029 units in 1971 (10.4% of all Sears' dishwasher sales) to 105,570 units in 1973 (23.8% of all Sears' dishwasher sales). (CX 151E)

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[4] In fact, this commonsense proposition is borne out by surveys conducted for Sears in 1972. In one survey, for example, 41% of all women respondents, and 32% of male respondents identified a "no pre-rinse" feature as "very desirable" and a feature for which the respondents would pay extra. Only "extra large capacity" outranked "no pre-rinse" in this survey in terms of desirability and consumer willingness to pay more to obtain it. (CX 186Z006)

The record reveals, however, that even at the time that the no scrape, pre-rinse claim was first disseminated, Sears lacked substantiation, or a reasonable basis for making it. (I.D. 99) Indeed, if anything, the tests purportedly relied upon by Sears at the time that it made its claim demonstrated precisely the reverse—that the Lady Kenmore could not ensure that the consumer would "never have to scrape or rinse again." (I.D. 100) And Sears' advertising message was further belied by the Owner's Manual furnished to all purchasers of Lady Kenmore, which advised them to pre-soak or "lightly" scour firmly cooked or baked-on foods before loading dishes in the dishwasher for washing. (I.D. 111; CX 99D, 100D)

Further evidence of the falsity of this advertising message appeared midway through its dissemination. Market research conducted in 1973 revealed that more than half of all recent purchasers of the Lady Kenmore either disagreed, or would not "completely agree" with the proposition that the Lady Kenmore "does not require pre-rinsing."[5] Notwithstanding the results of this survey, Sears continued to disseminate widely its claim that Lady Kenmore eliminated the need for pre-rinsing or scraping until at least 1975, and, in more isolated instances until at least 1977. Sears disseminated at the same time the claim that dishes on the top rack of the Lady Kenmore would be cleaned as thoroughly as those on the bottom, also a matter of considerable importance to the purchasing choices of consumers. (CX 180Z031) [9]

Extensive findings by Judge Hanscom reveal that neither the no pre-rinse claim, nor the equally clean on both racks claim could be substantiated by Sears, either at the time it began the advertisements, or now. (I.D. 33–98; 172–80) The record also demonstrates that the no pre-rinse claim is not true. (I.D. 101–69)[6]

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[5] 373 respondents were asked to indicate, on a scale of 1 to 7, with 1 being "disagree completely" and 7 being "agree completely" their response to the assertion that Lady Kenmore "Does Not Require Pre-Rinsing of Dishes." Only 49% of the respondents indicated that they agreed completely with this statement, 11% disagreed completely, 2% did not answer, and the remaining 38% indicated levels of agreement or disagreement somewhere between the extremes. (CX 125Z029) Presumably, however, anything less than complete agreement with the "no pre-rinse" claim would signify that in at least some cases the responder had encountered dirty dishes after use of the Lady Kenmore.

With the statement "Washes pots and pans thoroughly" the same survey revealed that over 70% of all respondents did not register complete agreement. (CX 125Z030) *See also* Tr. 1814–1848.

B. Product Coverage

To remedy the foregoing unfair and deceptive practices, complaint counsel proposed, and the ALJ adopted, an order prohibiting Sears from disseminating any untruthful or unsubstantiated performance claims for "major home appliances" as defined in the order. Sears contends on appeal that the order should extend only to prohibiting untruthful performance claims for dishwashers.[7]

[10]It is well established that in order to prevent recurrence of violations of law, the Commission may proscribe acts "like and related" to the one condemned. *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959). Courts have recognized that various types of deceptive advertising are readily transferrable to a wide range of products. Therefore, to ensure protection of the public against a repetition of deceptive advertising once it is found to have occurred, courts have sustained Commission orders that applied to "all products" of a company, or a wide range of products, on the basis of findings of deceptive advertising of only one or a small number of products. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394–5 (1965) (use of deceptive mock-ups of "all products" prohibited based upon use of deceptive mock-up of one product); *ITT Continental Baking Co., Inc.* v. *FTC*, 532 F.2d 207 (2d Cir. 1976) (order against misrepresenting growth properties of all food products sustained based upon misrepresentations of growth properties of one bread product); *Jay Norris* v. *FTC*, *supra*, 598 F.2d at 1250 (order against unsubstantiated performance or safety claims for all products of a mail order merchandiser sustained on the basis of misrepresentations of attributes of 6 products); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337, 342–3 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960) (order against deceptive pricing claims for all products of a mail order

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[6] The truth of the "equally clean" claim was not placed in issue, but, as Judge Hanscom observed, tests submitted by Sears itself demonstrated that the lower rack achieved a higher level of cleaning than the upper rack. (I.D. 178, 180)

[7] In its reply brief, Sears has also objected to the term "performance" to describe the types of claims that may not be made without substantiation. This objection was not raised, however, in Sears' appeal brief, the practical effect being that complaint counsel have been given no opportunity to answer. Section 3.52(b) of the Commission's Rules of Practice, 16 CFR 3.52(b), requires that a party contesting an initial decision shall specify in its appeal brief "the questions intended to be urged" and "the points of fact and law relied upon in support of the position taken on each question. . .". The reason for such a requirement is to permit the timely and orderly consideration of points in issue. If a party withholds objections to a specific part of an ALJ's order until the filing of its reply brief, to which the opposing party can make no response, the purpose of the rules is defeated. For this reason, we believe that Sears has waived its right to object to the term "performance" in the ALJ's order, although were the issue properly raised we would find it to be without merit. This precise term has been deemed proper by reviewing courts in the past, *Jay Norris* v. *FTC*, 598 F.2d 1244, 1250, 1253 (2d Cir.) *cert. denied*, 100 S. Ct. 481 (1979); *National Dynamics Corp.* v. *FTC*, 492 F.2d 1333, 1336 (2d Cir. 1973), *cert. denied*, 419 U.S. 993 (1974), and where, as here, two major performance characteristics have been misrepresented, an order covering all performance claims is appropriate.

merchandiser sustained on the basis of findings of deceptive pricing claims for one product).

The technique employed here, misrepresenting the performance characteristics of a dishwasher in a highly material respect, in order to distinguish it from the competition and gain added market share, is readily generalizable to a wide range of products, and this proceeding would be a pointless exercise indeed if it left Sears able to repeat with respect to refrigerators, stoves, washing machines, or other home appliances, the same deceptive technique that it used to merchandise the Lady Kenmore.

Sears correctly observes that in some cases reviewing courts have narrowed the product coverage of Commission orders, *e.g.*, *Chrysler Corp.* v. *FTC,* 561 F.2d 357 (D.C. Cir. 1977); *Standard Oil Co. of California* v. *FTC,* 577 F.2d 653 (9th Cir. 1978). The striking difference in facts between those cases and this one, however, serves only to emphasize the propriety of multi-product order coverage here. [11]

The appropriate scope of an order necessarily depends upon a rough evaluation of the extent to which a practice is likely to be repeated. Needless to say, no one can predict future events with precision, and so such an evaluation must inevitably be at best a rough guess. But within those constraints, the Commission and courts have looked to a variety of factors to judge the extent to which a respondent may be in need of restraint, and among them have been the nature of the violation itself (its magnitude and duration), the state of mind of the perpetrator (wilful, reckless, negligent, or unintending) and the prior history of violations by the respondent.

In at least two of the three foregoing respects, Sears' conduct is strikingly deficient, and warrants concern that its deceptive practices may be repeated with respect to other products if not restrained. The record here suggests a conscious, deliberate effort by Sears to mislead the consuming public as to the capabilities of the Lady Kenmore dishwasher, nationwide, over a period of three to four years, by numerous different advertisements. The advertisements that Sears ran were unequivocal in their meaning, and Sears should surely have known that that unequivocal message was without credible support—and untrue. If this was not manifest when the advertisements were first run (and we believe it was) it should certainly have become so to Sears by 1973 when consumer surveys revealed widespread disagreement with the "no-rinse" claim by Lady Kenmore users. Nevertheless, widespread dissemination of the "no-rinse" claim continued until 1975.

These facts of record are in stark contrast to those of *Standard Oil of California* v. *FTC, supra,* in which the sum of the deceptive advertising consisted of three advertisements, run for a period of five months. As the Ninth Circuit noted:

> Publication of the three advertisements in question was not a blatant disregard of the law. Petitioners' error was to miscalculate the effect which the televised commercials would have on the public. . . 577 F.2d at 663.[8]

[12]No such "miscalculation" can be claimed in this case. The meaning likely to be conveyed by "No scraping. No pre-rinsing." is not subject to reasonable doubt.[9]

A similar comparison with *Chrysler Corp.* v. *FTC*, *supra*, highlights the propriety of a multi-product order in this case. In *Chrysler*, the D.C. Circuit Court of Appeals, after characterizing the Commission's case on the merits as "somewhat thin", 561 F.2d at 363, struck order provisions that extended to "automotive products" based on Chrysler's misrepresentations of automobile characteristics.

The Court observed that in 12 out of 14 advertisements dealing with the same theme, Chrysler had endeavored to qualify the challenged representations so as to render them truthful, and concluded that

> Given [the Commission's] concession that the violations were unintentional, are not continuing, and were confined to two out of a campaign of fourteen advertisements, we fail to see any rational justification for these sweeping prohibitions. 561 F.2d at 364.

A final factor considered by courts has been the violator's past history of abuses. On this score, the record is less damning to Sears, but it hardly justifies ignoring the inferences to be drawn from the nature of the violation itself. Sears argues that the record shows it has compiled a good record with respect to maintaining substantiation for other product claims for which the Commission has requested substantiation. Complaint counsel argue that no inference may properly be drawn from cases in which the Commission took no action after soliciting substantiation from Sears, and cite instead, prior consent orders signed by Sears as evidence of its propensity to violate the law. Sears argues that these past orders are quite as irrelevant as complaint counsel believe Sears' unchallenged substantiation of non-dishwasher advertising to be.

On balance, we find these contentions of the parties as to the relevance of prior violations to be something of a wash. We have no doubt that with respect to the advertising of some other products, on some other occasions, Sears has adhered fully, and perhaps on some occasions, in an exemplary manner, to the requirements of the law. It would be shocking to discover that a retailer of its size and stature had not. But this hardly gives reason to disregard the blatant [13]violations of law that occurred and persisted in this case.[10]

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[8] The court in *Standard Oil* was also troubled by the "exceptionably burdensome. . .breadth and generality" of an order that applied to a wide range of products that "number in the thousands." 577 F.2d at 661. Here, by contrast, the Commission's order would apply only to a category of products, major home appliances, that is closely related to the product that was deceptively advertised.

[9] Of course, it is not necessary to a finding of Section 5 violation that the misrepresentation be shown to have been intentional, *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3d Cir. 1963), and a company that deceives consumers through reckless or even simply negligent disregard of the truth may do just as much harm as one that deceives consumers knowingly.

We must also reject other arguments made by Sears that in its view mitigate the need for an order, or one such as that proposed by complaint counsel. Citing dictum from an initial decision of an administrative law judge in another case, Sears suggests that its storewide policy of "satisfaction guaranteed" obviates the need for an order, because any consumer whose own experience with a Sears appliance belies the advertising claims made for it can obtain a full refund of the purchase price. (Appeal Brief, p. 21)

A money-back guarantee is no defense to a charge of deceptive advertising. *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666, 671 (7th Cir. 1967). Nor, as a practical matter, is a money-back guarantee in any way a satisfactory substitute for a requirement that an advertiser not engage in false and [14]unsubstantiated performance claims for its products. A money-back guarantee does not compensate the consumer for the often considerable time and expense incident to returning a major-ticket item and obtaining a replacement. Because of this, there are many circumstances in which consumers who have been materially misled by deceptive advertising may, upon discovering the deception, be unable to obtain any effective redress whatsoever through the money-back guarantee.

A consumer who purchases a major ticket item is likely to spend hours doing so, including the time taken to select the item at the store, and, in many cases, time taken to supervise or be present at home when the item is delivered and installed. If the consumer subsequently discovers that the appliance is not as represented in some respect, it may, nevertheless, not be worth the consumer's while to utilize the money back guarantee, because the amount that the consumer would stand to save by returning the product may not exceed the value of the consumer's time required to purchase and install a proper substitute.

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[10] A further consideration tending to neutralize Sears' claim of good conduct is the entry of a consent order in 1977 prohibiting Sears from engaging in "bait and switch" tactics in the sale of major home appliances. *Sears, Roebuck and Co.*, 89 F.T.C. 229 (1977). . . . Bait and switch is, like the practices challenged in this case, a form of deceptive advertising. In bait and switch, the advertiser holds itself out as being prepared to sell the consumer a low-cost model of a product, but then disparages this "bait" item in favor of more expensive models when the consumer comes to the place of sale.

Complaint counsel argue that the consent order should be taken as evidence of Sears' recidivist tendencies, and cite two recent decisions in which consent orders have been considered in determining the proper scope of a later order. *Jay Norris* v. *FTC*, *supra*, 598 F.2d at 1246, n.3; *Standard Oil of California* v. *FTC*, *supra*, 577 F.2d at 663. Sears rejoins that such consideration is improper given that its consent order states that it "does not constitute an admission by respondent that the law has been violated."

We agree that the consent order cannot be taken as evidence of prior law violations by Sears. It is, however, evidence that in the recent past the Commission has had "reason to believe" (the statutory standard for issuing a complaint) that Sears engaged in deceptive advertising of home appliances. This is relevant to the limited extent that it tends to undermine Sears' contention that Commission inaction with respect to certain Sears advertisements for which the Commission demanded substantiation demonstrates affirmatively that Sears' advertising, save for the advertising challenged in this case, has been unimpeachable.

Of course, even absent prior orders against a particular respondent, the Commission's failure to challenge some advertising of a respondent does not undermine the inferences to be drawn from advertising that is challenged. In this case, we base our conclusion that a multi-product order is warranted upon the rather egregious circumstances surrounding the violations of law that have been found. To the extent that respondent's conduct in running other advertisements is considered, we find that on balance the evidence introduced neither strengthens nor weakens our conclusion as to the appropriate scope of the order.

The foregoing phenomenon is especially likely to be operative where the deceptive advertising is designed simply to distinguish one workable product from another, rather than to merchandise a wholly worthless product. There is no suggestion in the record here that the Sears Lady Kenmore is not a good dishwasher, comparable in quality to those of competing manufacturers. The record simply suggests that the Lady Kenmore may not be superior to its competitors with respect to its cleaning capabilities, because like its competitors, it does not eliminate the need for pre-rinsing or scraping of dishes. A consumer who might pay $20, $30, or $40 extra for a Lady Kenmore, rather than purchase a model without the alleged capacity to eliminate the need for pre-rinsing, would quickly discover the misrepresentation upon use of the machine. The consumer's ability to return the machine to Sears, however, would in no way compensate him or her for the several additional hours necessary to supervise return of the product, purchase a substitute, and supervise its delivery and installation. Given that the Lady Kenmore might well perform no worse than a truthfully advertised substitute, the consumer would be faced with the choice of expending several additional hours of time in order to save a few dollars on an equivalent product. That many consumers would simply write the experience off to bad luck and retain the misrepresented appliance in these circumstances is clear. [15]

If Sears "satisfaction guaranteed" policy included a provision whereby Sears offered to adjust the price of its products to compensate consumers for the extra money they paid in reliance upon its false advertising, and if Sears' "satisfaction guaranteed" policy included a provision whereby Sears would fully compensate consumers for consequential damages including the loss in time entailed by the need to return a major home appliance and purchase a replacement, it might be viewed as an adequate substitute for the relief ordered here, although it would still not justify deceptive, unsubstantiated advertising. As the policy stands, however, it is likely to be virtually useless as a remedy for misleading advertising of the sort involved here.

Similarly unpersuasive is Sears' contention that no order is needed because it discontinued the offending advertising in April 1975, prior to initiation of the Commission's investigation in July, 1975. (Sears' Appeal Brief, p. 33). While it does appear that the bulk of Sears' nationwide deceptive advertising campaign ended in 1975, references to the "no pre-rinse" capacity of the Lady Kenmore appeared in catalogue material in 1976 (CX 257) and 1977 (CX 259).

Most importantly, however, discontinuance of a massive campaign of deceptive advertising after it has run for between three and four years can hardly be grounds not to fear resumption of such advertising in the future. Courts have recognized that discontinuance of an offending practice is neither a defense to liability, nor grounds for omission of an order. *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir.), *cert. denied,* 429 U.S. 818 (1976); *Coro, Inc.* v. *FTC,* 338 F.2d 149, 151–3 (1st Cir.), *cert. denied,* 380 U.S. 954 (1964); *Sears, Roebuck & Co.* v. *FTC,* 258 F.2d 307, 309–10 (7th Cir. 1919). One may imagine circumstances in which discontinuance of a deceptive practice would provide reason for confidence that it would not resume—for example, where an overzealous subordinate authorizes a false advertisement that is quickly squelched upon discovery by higher-ups. A three to four year campaign of misrepresentation, however, hardly falls into this category, and that, like most advertising campaigns, it eventually came to an end, provides no reassurance at all that similar practices will not be employed in the future.

Another argument raised by Sears is that the order of Judge Hanscom offends the First Amendment, by requiring Sears to maintain prior substantiation for performance claims made for major home appliances. Sears suggests that the order offends the First Amendment because it is overbroad, and because it would penalize an unsubstantiated claim even if that claim happened to be true. [16]

The foregoing contentions have been addressed with relation to the First Amendment in a recent case, *Jay Norris* v. *FTC, supra,* and emphatically rejected by the reviewing court. 598 F.2d at 1251–2. The Commission's order in this case does no more than prohibit in related form, the precise deceptive practices found to exist in this case. Under any reading of the Supreme Court's recent commercial speech cases, prohibitions upon deceptive commercial speech are not forbidden. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771–72 (1976); *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 383 (1977).

While the Commission has previously held that unsubstantiated advertising is unfair within the meaning of Section 5, *Pfizer, Inc.,* 81 F.T.C. 23 (1972), we have also recognized that such speech is deceptive as well. As we have observed:

> Many consumers are likely to assume that when a product claim is advanced which is in

> theory subject to objective verification, the party making it possesses a reasonable basis for so doing, and that the assertion does not constitute mere surmise or wishful thinking on the advertiser's part. As a result, the rendition of a claim based upon inadequate or nonexistent substantiation violates Section 5 for failure to state a highly material fact, whose omission is deceptive. *National Commission on Egg Nutrition*, 88 F.T.C. 84, 191 (1976); *aff'd. and ordered enforced as modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied* 439 U.S. 821 (1978).

A consumer who is told by Sears that the Lady Kenmore will eliminate the need for pre-rinsing and scraping of dishes is likely to assume that Sears has based that assertion on more than wishful thinking and a desire to outsell the competition. Consumers properly assume that an advertiser, which is in the best position to evaluate the efficacy of its product, has, indeed, verified the claims that it makes before it makes them. If consumers assumed otherwise, and could not depend on the reliability of advertising, advertising would lose much of its persuasive force, for no consumer would have any reason to believe in it.

Sears argues that the order entered herein would penalize it for the dissemination of a claim for which it lacked substantiation, but which might turn out to be truthful. (App. Br. 30–31). It cannot be denied that if an advertiser goes about spreading claims for its products [17] without regard for their accuracy (that is, without possessing prior substantiation), then the law of averages alone probably guarantees that some of these claims will be true, even though the profit motive probably guarantees that more will be false. In this peculiar sense it may be technically correct to say that the requirement of substantiation "burdens" the chance occurrence of truthful speech. This tiny "burden", however, is surely one that the First Amendment must allow, because it is vital to ensuring a far greater quantity of truthful speech by advertisers. *Jay Norris* v. *FTC; supra*, 598 F.2d at 1252.

For the foregoing reasons, we believe that entry of a multi-product order is entirely appropriate and necessary in this case. The record reveals an extensive campaign of wilfully or at best, recklessly negligent deceptive advertising for one major home appliance product. The issue is simply whether, in light of this record, the Commission may now attempt to protect the public from being subjected to the same sort of advertising campaign with regard to a related category of products in the future. The possibility of bringing a *de novo* Section 5 proceeding each time a given product is misrepresented is obviously a wholly inadequate deterrent, if only because the sanction for violating the law (an order with prospective application only) pales in comparison with the financial incentives for bending the truth. The purpose of an order is to create financial incentives to tell the truth, to counterbalance those that may have led a violator to engage in deception. We believe that it is appropriate in this case that those incentives be extended to Sears' major home appliances.

C. Definition of "Major Home Appliances"

In addition to disputing the extension of the order to products other than dishwashers, Sears objects to the term "major home appliances", which is defined in the order proposed by Judge Hanscom as:

> air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, freezers, ranges, microwave ovens, humidifiers, dehumidifiers, *and any other product that falls into the category of major home appliances.* (I.D. p. 87, emphasis added)

[18]Sears contests the underlined language on grounds that it leaves Sears in doubt as to the precise scope of the order's coverage, and cites as examples of products the coverage of which is left unclear "stoves, stereophonic consoles. . .television receivers, floor polishers, vacuum cleaners and sweepers." (Appeal Brief, p. 23)

Although we do not believe that the use of a broad catch-all term such as "major home appliances" is necessarily inappropriate[11], in this case in order to provide maximum specificity we shall omit the catch-all language from our definition of major home appliances. Sears' obligations will, therefore, be limited to the products specified in the order.[12]

D. Record Keeping Provision

Sears has also objected to Par. III(b) of the ALJ's order, which requires that it maintain

> *all matter in [Sears] possession* which contradicts, qualifies or calls into question any claim or representation in advertising. . .concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances. [emphasis added]

Sears objects to the underlined language as being vague and overbroad, and suggests that it be changed to read "all test reports or demonstrations prepared by or for Sears." (Appeal Brief, p. 20) We agree that in this context the term "all matter" is excessive, and will amend the order to require retention only of applicable "test reports, studies, surveys and demonstrations. . ." [19]

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[11] As complaint counsel point out, Sears itself, in 1977, agreed to a consent order in which it was prohibited from using bait and switch tactics in the sale of "major home appliances". The definition in the consent order specified certain categories of appliances, but also noted that the term was "not limited to" those terms, *Sears, Roebuck and Co.*, 89 F.T.C. 229, 235 (1977).

[12] We have, *however*, added "stoves" and "ovens" to "ranges" in Judge Hanscom's order, because Sears' brief reflects its view that the term "stoves" is not comprehended by the term "ranges". (Appeal Brief, p. 23) It is not apparent that Judge Hanscom intended any such distinction, and, in any event, we can see no warrant for any.

E. Summary of Order Changes

Paragraph I of the Commission's Order contains definitions collected from various parts of Judge Hanscom's Order. Paragraph I(1) defines "major home appliances" [ALJ's Paragraph II(4) as modified] and Paragraph I(2) defines a "competent and reliable test." [ALJ's Paragraph II(1)(a)]

Paragraph II of the Commission's Order corresponds to Paragraph I of Judge Hanscom's order, minus subparagraph (3) of the ALJ's order, which referred specifically to the Sani-Wash cycle. Sears does not object to the remaining provisions of this paragraph.

Paragraph III of the Commission's Order corresponds to Paragraph II of Judge Hanscom's order, minus the definitional paragraphs. Subparagraph (1) concerns the prior substantiation requirements discussed earlier. Subparagraph (2) governs misrepresentations of the significance of tests or demonstrations and subparagraph (3) prohibits advertising statements that are contrary to or inconsistent with statements made in post-purchase materials (such as owners' manuals) supplied to purchasers. Sears has not objected to either of these latter two subparagraphs except insofar as they extend to "major home appliances" instead of "dishwashers." Our discussion of the appropriate scope of the substantiation requirement is equally applicable to the scope of subparagraphs II(2) and II(3).

Paragraph IV of the Commission's Order corresponds to Paragraph III of Judge Hanscom's order, with the change in the recordkeeping provision of the second subparagraph discussed above.

Paragraph V of the Commission's Order corresponds to Paragraph IV of Judge Hanscom's order, and contains routine compliance reporting requirements.

We have also added, at complaint counsel's suggestion, a synopsis of determinations, to facilitate application of some of the holdings in this case to other cases [pursuant to Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)] should others engage in the same practices as have occurred here.

An appropriate order is appended.

SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. 45(m)(1)(B) SEARS, ROEBUCK AND CO., DOCKET NO. 9104

It is unfair and deceptive, and unlawful under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for a party to engage in the following practices:

1. Making an advertising representation, directly or by implication,

that a dishwasher can completely clean dishes, pots and pans without prior scraping or rinsing, without possessing and relying upon a reasonable basis for the representation at the time that it is first disseminated. A reasonable basis for such a claim shall consist of competent and reliable tests or other competent and reliable evidence which substantiates such representation. Competent and reliable tests are those in which persons with skill and expert knowledge in the field conduct the test and evaluate its results in an objective manner using testing procedures which ensure accurate and reliable results.

2. Making an advertising representation for a product, directly or by implication, that is materially inconsistent with statements or representations contained in owners manuals or other post purchase materials disseminated to purchasers of the product.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel for respondent, and upon briefs and oral argument in support of and in opposition to the appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted the appeal in part, and denied the appeal in part. Therefore,

It is ordered, That the initial decision of the administrative law judge, pages 1-85, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for Findings 24-25; last sentence of Finding 26; all of page 80 beginning with the first full paragraph thereon; page 81 except for final paragraph; and except as is otherwise inconsistent with the attached opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be entered: [2]

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

1. "Major home appliance" means air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, ranges, stoves, ovens (including microwave ovens), and humidifiers.

2. "Competent and reliable test" means a test in which persons

with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner, using test procedures that insure accurate and reliable results. Such tests must be truly and fully representative of expectable consumer usage.

II.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any Sears dishwasher will completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.
2. Representing, directly or by implication, that dishes in the top rack of any Sears dishwasher will get as clean as those on the bottom rack without prior rinsing or scraping.

It shall be an affirmative defense to a compliance action brought under the preceding paragraphs for Sears, Roebuck and Co. to establish that the representation is truthful. [3]

III.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statements or representations, directly or by implication, concerning the performance of such products unless such statements or representations are true and unless, at the time the statements or representations are made, Sears, Roebuck and Co. possesses and relies on a reasonable basis for such statements or representations, which shall consist of competent and reliable tests, or

other competent and reliable evidence which substantiates such statements or representations.

2. Misrepresenting in connection with the advertisement of any such products or in any other manner, directly or by implication, the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research.

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such products which are inconsistent in any material respect with any statements or representations contained directly or by implication in post purchase material(s) supplied to the purchasers of such products.

IV.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers or other "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records: [4]

1. Of all materials that were relied upon in making any claim or representation in advertising, sales materials, promotional materials, or post purchase materials, concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances;

2. Of all test reports, studies, surveys, or demonstrations in their possession that contradict, qualify, or call into question any claim or representation in advertising, sales materials, promotional materials, or post purchase materials disseminated by Sears, Roebuck and Co., or by any advertising agency on behalf of Sears, Roebuck and Co., concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances.

Such records shall be retained by Sears, Roebuck and Co. for a period of three years from the date such advertising, sales materials, promotional materials, or post purchase materials were last disseminated. Such records may be inspected by the staff of the Commission upon reasonable notice.

V.

It is further ordered, That Sears, Roebuck and Co. shall notify the

Commission at least 30 days prior to the effective date of any proposed change in it as a corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That Sears, Roebuck and Co. shall forthwith distribute a copy of this order to each of its operating divisions, and to each of its officers, agents, representatives and employees engaged in or connected with the preparation and placement of advertisements for dishwashers or other major home appliances.

It is further ordered, That Sears, Roebuck and Co. shall within sixty (60) days after service upon it of this order, and at such other times as the Commission may require, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

AHC PHARMACAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3017. Complaint, April 28, 1980 — Decision, April 28, 1980

This consent order requires, among other things, a Miami, Fla. firm and its corporate president, engaged in the marketing and advertising of health related products, to cease disseminating advertisements which represent that the use of AHC Gel or any similar preparation, alone or as part of an acne control regimen, cures acne and results in a blemish-free skin; or that any such preparation is superior to other over-the-counter acne products. Respondents are required to have a reasonable basis for advertising representations relating to product performance, efficacy and results and prohibited from misrepresenting the extent or results of product testing. Respondents are further prohibited from disseminating advertisements for acne products without first disseminating prescribed corrective advertising as specified in the order. Additionally, ad substantiation must be maintained for a period of three years.

Appearances

For the Commission: *Steven Newborn.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that AHC Pharmacal, Inc. (hereinafter "AHC Pharmacal"), a corporation, and James E. Fulton, M.D. (hereinafter "Fulton"), as an individual and corporate officer, hereinafter at times referred to as respondents, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

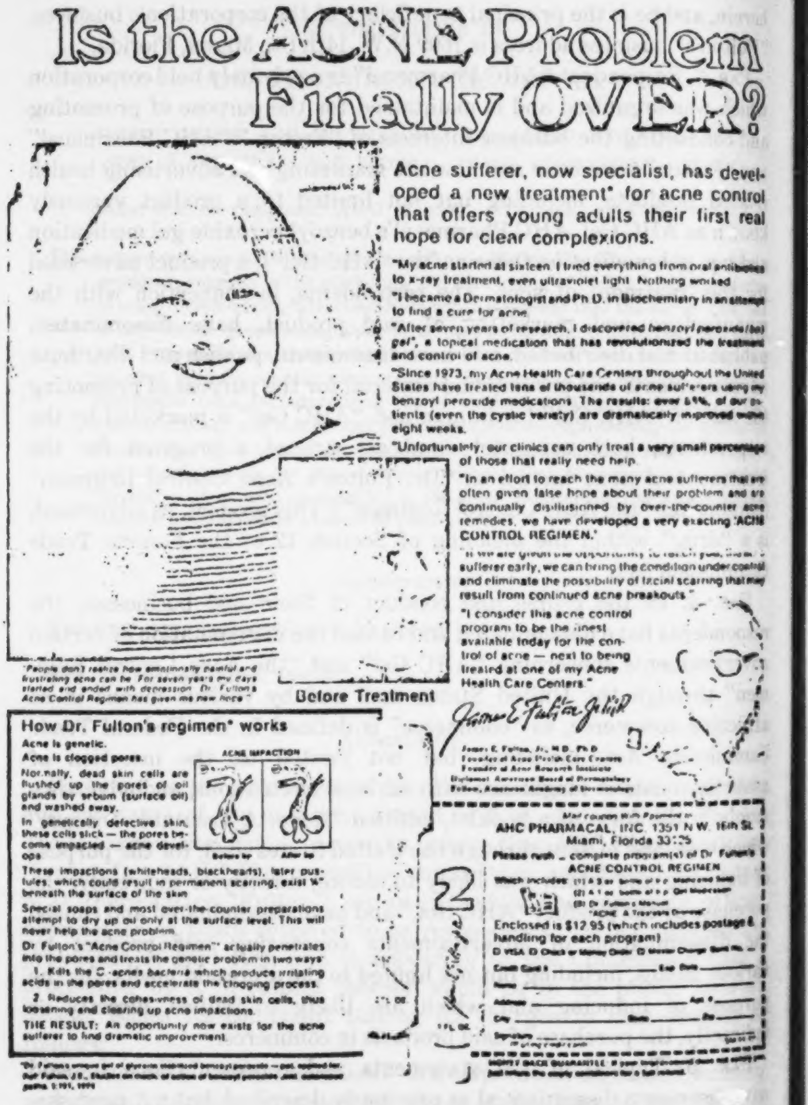
PARAGRAPH 1. "AHC Pharmacal" is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 1609 N.W. 14th St., Miami, Florida.

PAR. 2. "Fulton" is an individual and corporate president of "AHC Pharmacal." He formulates, directs and controls the acts and practices of "AHC Pharmacal," including the acts and practices described herein, and he is the principal beneficiary of the corporation's business. "Fulton's" business address is 1609 N.W. 14th St., Miami, Florida.

PAR. 3. Respondent "AHC Pharmacal" is a privately held corporation which was organized and is maintained for the purpose of promoting and conducting the business interests of "Fulton." "AHC Pharmacal" and "Fulton" have been and now are marketing and advertising health related products, including but not limited to a product variously known as AHC Gel, AHC Pharmacal's benzoyl peroxide gel medication and b.p. gel medication (hereinafter "AHC Gel"), a product advertised for the treatment of acne. The respondents, in connection with the manufacture and marketing of said product, have disseminated, published and distributed, and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of "AHC Gel" for human use. "AHC Gel" is marketed by the respondents, both separately and as part of a program for the treatment of acne known as "Dr. Fulton's Acne Control Regimen" (hereinafter "the Acne Control Regimen"). This product, as advertised, is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning "AHC Gel" and "the Acne Control Regimen" through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines with national circulations, and advertisements in the form of a booklet, entitled "Acne: A Treatable Disease" which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the product "AHC Gel," and have disseminated and caused the dissemination of advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said products in commerce.

PAR. 5. Typical of the statements and representations in said advertisements disseminated as previously described, but not necessarily inclusive thereof, are the following:



Is the ACNE Problem Finally OVER?

Acne sufferer, now specialist, has developed a new treatment* for acne control that offers young adults their first real hope for clear complexions.

"My acne started at sixteen. I tried everything from oral antibiotics to x-ray treatment, even ultraviolet light. Nothing worked.

"I became a Dermatologist and Ph.D. in Biochemistry in an attempt to find a cure for acne.

"After seven years of research, I discovered *benzoyl peroxide (bp) gel*", a topical medication that has revolutionized the treatment and control of acne.

"Since 1973, my Acne Health Care Centers throughout the United States have treated tens of thousands of acne sufferers using my benzoyl peroxide medications. The results: over 85%, of our patients (even the cystic variety) are dramatically improved within eight weeks.

"Unfortunately, our clinics can only treat a very small percentage of those that really need help.

"In an effort to reach the many acne sufferers that are often given false hope about their problem and are continually disillusioned by over-the-counter acne remedies, we have developed a very exacting 'ACNE CONTROL REGIMEN.'

"If we are given the opportunity to reach you, the acne sufferer early, we can bring the condition under control and eliminate the possibility of facial scarring that may result from continued acne breakouts."

"I consider this acne control program to be the finest available today for the control of acne — next to being treated at one of my Acne Health Care Centers."

James E. Fulton Jr. M.D.

James E. Fulton, Jr., M.D., Ph.D.
Founder of Acne Health Care Centers
Founder of Acne Research Institute
Diplomat American Board of Dermatology
Fellow, American Academy of Dermatology

"People don't realize how emotionally painful and frustrating acne can be. For seven years my days started and ended with depression. Dr. Fulton's Acne Control Regimen has given me new hope."

Before Treatment

How Dr. Fulton's regimen* works

Acne is genetic.

Acne is clogged pores.

ACNE IMPACTION

Before bp After bp

Normally, dead skin cells are flushed up the pores of oil glands by sebum (surface oil) and washed away.

In genetically defective skin, these cells stick — the pores become impacted — acne develops.

These impactions (whiteheads, blackheads), later pustules, which could result in permanent scarring, exist ¼" beneath the surface of the skin.

Special soaps and most over-the-counter preparations attempt to dry up oil only at the surface level. This will never help the acne problem.

Dr. Fulton's "Acne Control Regimen"* actually penetrates into the pores and treats the genetic problem in two ways:

1. Kills the C.-acnes bacteria which produce irritating acids in the pores and accelerate the clogging process.

2. Reduces the cohesiveness of dead skin cells, thus loosening and clearing up acne impactions.

THE RESULT: An opportunity now exists for the acne sufferer to find dramatic improvement.

Mail coupon with payment to:

**AHC PHARMACAL, INC. 1351 N.W. 16th St.
Miami, Florida 33125**

Please rush __ complete program(s) of Dr. Fulton's
ACNE CONTROL REGIMEN

Which includes: (1) A 3 oz. bottle of b.p. Medicated Soap
(2) A 1 oz. bottle of b.p. Gel Medication
(3) Dr. Fulton's Manual "ACNE: A Treatable Disease"

Enclosed is $12.95 (which includes postage & handling for each program)

☐ VISA ☐ Check or Money Order ☐ Master Charge Bank No. —

Credit Card # ______________ Exp. Date ________

Name ______________________________

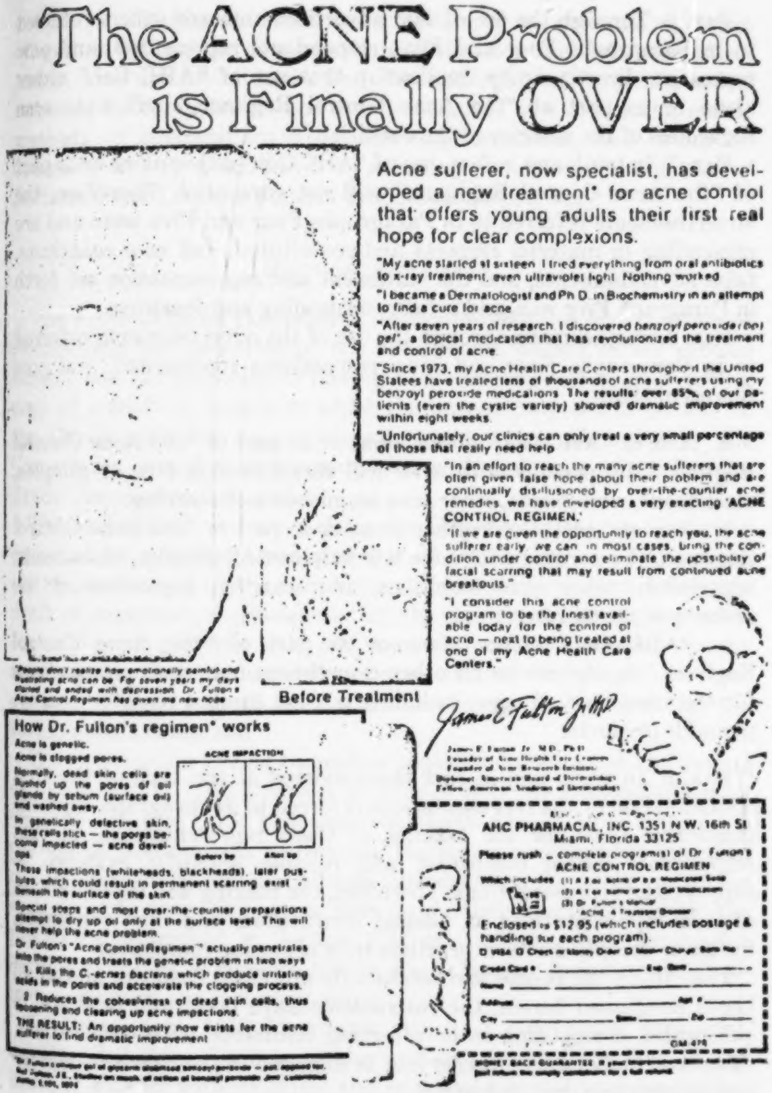
Address ______________________ Apt. # ______

City ______________ State ________ Zip ______

Signature ______________________________
[illegible]

MONEY BACK GUARANTEE. If your improvement does not satisfy you, just return the empty containers for a full refund.

*Dr. Fulton's unique gel of glycerin stabilized benzoyl peroxide — pat. applied for. Ref: Fulton, J.E., Studies on mode of action of benzoyl peroxide. [illegible] 1:191, 1974



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"Unfortunately, our clinics can only treat a very small percentage of those that really need help.

"In an effort to reach the many acne sufferers that are often given false hope about their problem and are continually disillusioned by over-the-counter acne remedies, we have developed a very exacting 'ACNE CONTHOL REGIMEN.'

"If we are given the opportunity to reach you, the acne sufferer early, we can, in most cases, bring the condition under control and eliminate the possibility of facial scarring that may result from continued acne breakouts."

"I consider this acne control program to be the finest available today for the control of acne — next to being treated at one of my Acne Health Care Centers."

James E Fulton Jr MD

James E. Fulton Jr. M.D. Ph.D.
Founder of Acne Health Care Centers
Founder of Acne Research Institute
Diplomat, American Board of Dermatology
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*Dr. Fulton's unique gel of glycerin stabilized benzoyl peroxide — pat. applied for. Ref: Fulton, J.E., Studies on mech. of action of benzoyl peroxide [illegible]

[illegible]

AHC PHARMACAL, INC. 1351 N.W. 16th St
Miami, Florida 33125

Please rush _ complete program(s) of Dr. Fulton's
ACNE CONTROL REGIMEN

Which includes (1) A 3 oz. bottle of b.p. Medicated Soap
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(3) Dr. Fulton's Manual "ACNE: A Treatable Disease"

Enclosed is $12.95 (which includes postage & handling for each program).

☐ VISA ☐ Check or Money Order ☐ Master Charge Bank No. —

Credit Card # ____________ Exp. Date ____________

Name ____________

Address ____________ Apt. # ____________

City ____________ State ____________ Zip ____________

Signature ____________

GM 476

MONEY BACK GUARANTEE. If your improvement does not satisfy you, just return the empty containers for a full refund.

PAR. 6. Through the use of said advertisements and others referred to in Paragraphs Four and Five, respondents represented, and now represent, directly or by implication that use of "AHC Gel," either alone or as part of "the Acne Control Regimen," will cure acne regardless of the severity of the condition.

PAR. 7. In truth and in fact, use of "AHC Gel," either alone or as part of "the Acne Control Regimen," will not cure acne. Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statement and representation set forth in Paragraph Five was, and is false, misleading and deceptive.

PAR. 8. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondents represented, and now represent that:

a. Use of "AHC Gel," either alone or as part of "the Acne Control Regimen," by persons with acne will result in skin free of pimples, blackheads, whiteheads, other acne blemishes, and scarring.

b. Use of "AHC Gel," either alone or as part of "the Acne Control Regimen," by persons with acne will help control pimples, blackheads, whiteheads, other acne blemishes, and scarring, regardless of the severity of the disease.

c. "AHC Gel," either alone or as part of "the Acne Control Regimen," is superior to all other over-the-counter acne preparations for the treatment of acne, including but not limited to other benzoyl peroxide products.

PAR. 9. In truth and in fact there existed at the time of the first dissemination of the representations referred to in Paragraph Eight no reasonable basis for the making of these representations, in that respondents lacked competent and reliable scientific evidence to support said representations. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct its aforesaid business, and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

PAR. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent AHC Pharmacal, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 1609 N.W. 14th St., Miami, Florida.

2. Respondent James E. Fulton, M.D. is an individual and corporate officer of AHC Pharmacal, Inc. and maintains an office at 1609 N.W. 14th St., Miami, Florida.

3. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents AHC Pharmacal, Inc., a corporation, and James E. Fulton, individually and as a corporate officer, their successors and assigns, either jointly or individually, and the corporate respondent's officers, agents, representatives, and employees, directly or through any corporation, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisements by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of a product variously known as AHC Gel, AHC Pharmacal's benzoyl peroxide gel medication and b.p. gel medication (hereinafter "AHC Gel") either alone or as part of "Dr. Fulton's Acne Control Regimen" (hereinafter "the Acne Control Regimen") or any other acne product or regimen will cure acne or any skin condition associated with acne.

2. Misrepresents the extent to which any product has been tested or the results of any such test(s).

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "AHC Gel", either alone or as part of "the Acne Control Regimen", or use of any other acne product or regimen by persons with acne, will result in skin free of pimples, blackheads, whiteheads, other acne blemishes, or scarring;

2. Represents that "AHC Gel", either alone or as part of "the Acne Control Regimen", or any other acne product or regimen, is superior to other over-the-counter acne preparations for the treatment of acne, including but not limited to other benzoyl peroxide products,

unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two well-controlled double-blind clinical studies which are conducted by different persons, independently of each other. Such persons shall be dermatologists who are qualified by scientific training and experience to treat acne and conduct the aforementioned studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

II

It is further ordered, That within sixty (60) days of the acceptance of this order, respondents shall cease and desist from disseminating or causing the dissemination of advertisements for "AHC Gel", "the Acne Control Regimen", and/or any other acne product or regimen, unless respondents first disseminate corrective advertisements for the Acne Control Regimen (including AHC Gel) in Sunday newspaper supplements and on radio.

A. All such Sunday newspaper supplement corrective advertisements shall clearly and conspicuously disclose, in the headline with boldface type no smaller than 48 points (one-half inch) in height, that "no product can cure acne." Nothing in the headline, or any part of the advertisement, shall in any way obscure or contradict the clear meaning of the disclosure. Furthermore, no language in said advertisement shall appear in a type size equal to or larger than the headline type size.

Said Sunday newspaper supplement corrective advertisements shall be disseminated in the following cities: Boston, MA; Atlanta, GA; Cleveland, OH; Philadelphia, PA; Pittsburgh, PA; and San Francisco, CA. Respondents may substitute cities of reasonable demographic and geographic similarity, provided that said cities are substituted on a one-for-one basis. Said corrective advertisements shall be run at least one full-page advertisement per month for a time period of three consecutive months, provided that said advertisements shall not be disseminated during the months of June, July, or August.

Respondents may elect to run two half-page corrective advertisements in the place of each and every full-page corrective advertisement to satisfy their corrective advertising obligations under this part of the order. *Provided, however*, that all such corrective advertisements must be run in different weekly issues of the aforementioned newspaper supplements for any given locale, and other requirements of this order (*e.g.*, headline type size, dissemination schedule, etc.) are fully complied with.

B. All corrective advertisements which are required for dissemination by radio shall be at least thirty seconds in duration and shall begin with the unobscured announcement that "no product can cure acne." Nothing else in the advertisement shall in any way obscure or contradict the clear meaning of this statement. Said radio corrective advertisements shall be disseminated as non-consecutive spots over major radio stations (as defined below) in the following urban areas: Chicago, IL; Los Angeles, CA; Miami, FL. Said radio corrective advertisements shall be disseminated at least twice each month during the same three months as the Sunday newspaper supplement corrective advertisements, referred to in IIA, are disseminated.

For purposes of this order a "major radio station" shall be defined as a radio station which (a) has a broadcast power of at least 6,000 watts horizontal and 6,000 watts vertical, and (b) is described in its own promotional materials as being targeted at teenagers or young adult audiences and/or primarily playing rock, disco or contemporary hit music.

C. The obligation to run corrective advertisements shall not in any way alleviate other order obligations. Furthermore, such advertisements shall not represent, directly or indirectly, that the Federal Trade Commission approves, recommends or in any manner endorses the advertised product or product's advertising.

III

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That such respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

It is further ordered, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

In the Matter of

ELI LILLY AND COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3021. Complaint, April 29, 1980 — Decision, April 29, 1980

This consent order requires, among other things, an Indianapolis, Indiana manufacturer and seller of pharmaceuticals and other chemical substances, to cease engaging in several anticompetitive practices involving the United States finished insulin industry. Additionally the order requires Eli Lilly and Co. to grant certain licenses covering its existing and future insulin-related technology to existing and prospective competitors.

Appearances

For the Commission: *William C. Holmes.*

For the respondent: *Charles E. Buffon, Covington & Burling,* Washington, D.C.

Complaint

The Federal Trade Commission, having reason to believe that Eli Lilly and Company, hereinafter referred to as "Lilly" or "respondent", has violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

I. RESPONDENT

Paragraph 1. Lilly is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its principal executive offices located at 307 East McCarty St., Indianapolis, Indiana.

Par. 2. Lilly's principal business is the manufacture and sale of chemical compounds and substances for use by or on living organisms — human, plant and animal. This business accounted for approximately 89% of the consolidated net sales of Lilly and its subsidiaries during the years 1972 through 1976.

Par. 3. In 1976, Lilly's consolidated net sales were approximately $1.34 billion, consolidated net income after taxes was approximately

$200 million, and consolidated total assets were approximately $1.58 billion. Sales of pharmaceuticals accounted for approximately $761 million of Lilly's consolidated net sales in 1976.

II. NATURE OF TRADE AND COMMERCE

A. Relevant Market

PAR. 4. The relevant geographic market involved in this complaint is the United States as a whole.

PAR. 5. The relevant product market involved in this complaint is finished insulin.

PAR. 6. Finished insulin is a drug used by approximately 1,600,000 diabetics within the United States in the treatment of diabetes mellitus, commonly known as diabetes. For those diabetics who are insulin-dependent, finished insulin is the only method of treatment.

PAR. 7. The market for finished insulin has been and is expanding rapidly. In 1970, total industry sales of finished insulin within the United States were approximately $26 million. By 1976, industry sales had expanded to approximately $57 million, representing an increase of more than 119% between 1970 and 1976.

PAR. 8. The market for finished insulin within the United States is dominated by Lilly. Only two firms, including Lilly, account for 100% of total industry sales. Lilly alone accounted for more than 85% of total industry sales during the period from 1970 through 1976.

B. Industry Information

PAR. 9. A vital raw material in the production of finished insulin is animal pancreas glands, derived as by-products from meat slaughterhouses. Unrefined insulin and other materials are extracted from these glands in a form called "insulin salt cake." Insulin salt cake is then purified into a precipitate referred to as "insulin crystals." Insulin crystals are combined with other substances to produce finished insulin.

PAR. 10. Lilly is the only firm in the United States finished insulin industry that is fully integrated. Lilly purchases animal pancreas glands, extracts raw insulin from the glands in the form of insulin salt cake, refines the salt cake into insulin crystals, produces finished insulin from the crystals, and markets the finished insulin to hospitals and pharmacies throughout the United States for use by diabetics.

PAR. 11. Lilly purchases its requirements of animal pancreas glands from United States meat slaughterhouses either directly or through "collectors" or "brokers." "Collectors" are firms that purchase glands from the slaughterhouses for their own accounts, trim and freeze the glands, and then sell them to manufacturers, either directly or through brokers. "Brokers," in contrast, are firms that simply arrange for the purchase and/or sale of the glands at a commission.

III. JURISDICTION

PAR. 12. At all times relevant to this complaint, Lilly has purchased and offered to purchase animal pancreas glands from meat slaughterhouses, collectors and brokers located throughout the United States, and has sold, shipped and promoted its finished insulin products to customers located throughout the United States. Lilly has thereby engaged in or affected commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Except to the extent that competition has been hindered, restrained or frustrated by the acts and practices alleged below in this complaint, Lilly has been and is in competition with other firms in the purchase of pancreas glands within the United States and in the sale and distribution of finished insulin within the United States.

A. Count I

PAR. 13. Lilly has monopoly power within the relevant market.

PAR. 14. Lilly has since at least 1952 directly and indirectly engaged in acts, practices and methods of competition that, individually or collectively, have willfully maintained its monopoly power within the relevant market and that have given it the power to inhibit, frustrate and restrain actual and potential competition within the relevant market.

Examples of such acts, practices and methods of competition include, but are not limited to, the following:

(a) Lilly has conspired with other domestic and foreign companies, including certain collectors, brokers, and other manufacturers of insulin, to:

(1) Allocate and control the meat slaughterhouses at which pancreas glands are collected within the United States;

(2) Allocate and control the distribution of pancreas glands collected within the United States;

(3) Suppress potential competition in the collection of pancreas glands within the United States through such acts, practices and methods of competition as:

(i) A concerted refusal to deal with collectors and brokers not privy to the conspiracy (hereinafter "disfavored collectors and brokers");
(ii) The inducement of refusals to deal with disfavored collectors and brokers by their customers and suppliers;

(b) Lilly has acquired exclusive licenses within the United States to certain key patents in the production of insulin products, including in particular a 1952 exclusive patent license from Novo Industri A/S, a Danish insulin producer ("Novo"), that expressly precluded other insulin manufacturers from entering the United States finished insulin market with certain key insulin products.

PAR. 15. The aforesaid acts, practices and methods of competition by Lilly have had, among others, the following effects:

(a) The discouragement of potential entry into the United States finished insulin market, including, in particular, potential entry by:

(1) The insulin manufacturers privy to the aforementioned conspiracy affecting the collection and distribution of pancreas glands within the United States;
(2) The insulin manufacturers affected by the aforementioned exclusive patent licenses;
(3) Novo Industri A/S;

(b) The creation and maintenance of barriers to competition in the United States finished insulin market through:

(1) Control of the pancreas glands needed to produce finished insulin within the United States;
(2) Control of key patents significant to effective competition within the United States finished insulin market.

PAR. 16. The aforesaid acts, practices and methods of competition constituted and still constitute unfair methods of competition and unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

B. Count II

PAR. 17. Lilly has since at least 1952 acquired patent rights under exclusive patent licenses where the effect has been to tend to substantially lessen competition, or to tend to create a monopoly, within the relevant market.

An example of such acquisitions includes, but is not limited to, the 1952 exclusive patent license from Novo Industri A/S referred to in Paragraph Fourteen (b), above.

PAR. 18. The aforesaid acquisitions by Lilly have had, among others, the following effects:

(a) The discouragement of potential entry into the United States finished insulin market, including, in particular, entry by:

(1) The insulin manufacturers affected by the aforementioned exclusive patent licenses;
(2) Novo Industri A/S;

(b) The creation and maintenance of barriers to competition in the United States finished insulin market through control of key patents.

PAR. 19. The aforesaid acquisitions by Lilly constituted and still constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34, now in further conformity with the procedure prescribed in Section 2.34 of its

Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Eli Lilly and Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal executive offices located at 307 East McCarty St., Indianapolis, Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

DEFINITIONS

It is ordered, That the following definitions shall apply in this order:

1. "Lilly" means respondent Eli Lilly and Company, its subsidiaries, and its successors and assigns.

2. "Animal Insulin Products" means insulin extracted from animal pancreas glands, including any and all stages of production (insulin salt cake, insulin crystals and/or finished insulin).

3. "Other Insulin Products" means insulin produced by chemical synthesis, by microbes genetically manipulated using recombinant DNA techniques, or by any other methods other than extraction from animal pancreas glands.

4. "Existing Patents" means:

(a) United States and foreign patents owned by Lilly, or with respect to which Lilly has the power to grant licenses or sub-licenses, as of the date that the agreement containing this order is signed by Lilly, and

(b) Applications for United States and foreign patents, and any patents which may issue on any such applications, which applications are owned by Lilly, or with respect to which Lilly has the power to grant licenses or sub-licenses, as of the date that the agreement containing this order is signed by Lilly.

5. "Existing Know-How" means technical information, processes and procedures, whether patented or unpatented, which are used by Lilly in commercial production of Animal Insulin Products within the United States as of the date that the agreement containing this order is signed by Lilly. Lilly's obligation to make certain of such know-how available to licensees pursuant to this order may be met by (a) providing such licensees with a written description of the licensed

know-how sufficient to enable one reasonably skilled in the art to understand and reproduce such know-how, and (b) upon written request by a licensee, additionally providing written clarification respecting licensed know-how to such licensee where such clarification is reasonably necessary.

6. "Future Patents" means United States patents (exclusive of Existing Patents) issued within five (5) years after the date that the agreement containing this order is signed by Lilly, which patents are owned by Lilly, or with respect to which Lilly acquires the power to grant licenses or sub-licenses.

7. "Future Know-How" means technical information, processes and procedures (exclusive of Existing Know-How), whether patented or unpatented and including any United States patents which may issue thereon, which relate to the production of Animal or Other Insulin Products, and which Lilly acquires from persons, research groups or companies other than Lilly and Lilly employees within five (5) years after the date that the agreement containing this order is signed by Lilly, and which are in writing and are known by Lilly to have been reduced to practice by Lilly or by the persons, research groups or companies from which the know-how is acquired. Lilly's obligation to make certain of such know-how available to licensees pursuant to this order may be met by (a) providing such licensees with a written description of the licensed know-how sufficient to enable one reasonably skilled in the art to understand and reproduce such know-how, and (b) upon written request by a licensee, additionally providing written clarification respecting licensed know-how to such licensee where such clarification is reasonably necessary.

8. "Patents Issuing on Future Applications" means United States patents (exclusive of Existing or Future Patents) owned by Lilly which issue on applications filed within five (5) years after the date that agreement containing this order is signed by Lilly, which applications cover innovations developed by Lilly or Lilly employees.

9. "Reduced to practice" means demonstrated by actual use, by tests or by laboratory experiments as being workable for its intended purpose.

10. "Domestic Company" means any sole proprietorship, partnership, corporation or other business entity that is a United States citizen and that is not owned or controlled by a business entity that is not a United States citizen.

11. "Foreign Company" means any sole proprietorship, partnership, corporation or other business entity that is not a United States citizen, and any business entity that is a United States citizen but is

owned or controlled by a business entity that is not a United States citizen.

12. "United States" means the United States of America, its territories and possessions, and the Commonwealth of Puerto Rico.

13. "The date that the agreement containing this order is signed by Lilly" means and is: May 30, 1979.

II

PRACTICES PROHIBITED

It is further ordered, That Lilly, and its directors, officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device:

A. In connection with the purchase or sale of animal pancreas glands used in the manufacture of Animal Insulin Products:

(1) Shall not participate in any agreement or conspiracy with any manufacturer of any Animal Insulin Products or any buyer, broker or collector of animal pancreas glands to allocate or control the meat slaughterhouses within the United States from which animal pancreas glands are or will be obtained.

(2) Shall not participate in any agreement or conspiracy with any manufacturer of any Animal Insulin Products or any buyer, broker or collector of animal pancreas glands to allocate or divide animal pancreas glands obtained from meat slaughterhouses within the United States.

(3) Shall not participate in any agreement or conspiracy with any manufacturer of any Animal Insulin Products or any buyer, broker or collector of animal pancreas glands to suppress or limit actual or potential competition in the purchase or sale of animal pancreas glands obtained from meat slaughterhouses within the United States by (a) refusing to deal with any buyer, broker or collector of animal pancreas glands collected within the United States, or (b) inducing any manufacturer of any Animal Insulin Products, any buyer, broker or collector of animal pancreas glands or any meat slaughterhouses located within the United States, to refuse to deal with any buyer, broker or collector of animal pancreas glands collected within the United States.

(4) Provided that nothing contained in Subparagraphs (1), (2), and (3) above shall be construed to prevent Lilly (a) from making purchases of animal pancreas glands in the ordinary course of business from meat slaughterhouses, collectors, brokers and other sellers of such glands

located in the United States or elsewhere, (b) from entering into supply contracts with meat slaughterhouses, collectors, brokers and other sellers of glands located in the United States or elsewhere for reasonable periods of time not to exceed thirteen (13) months, or (c) from unilaterally refusing to purchase animal pancreas glands which do not meet Lilly's insulin yield or other quality standards, which Lilly does not need, or which are offered at a price unacceptable to Lilly.

B. Shall not for a period of ten (10) years after the date that the agreement containing this order is signed by Lilly enter into or enforce any provision in any license of any patent or know-how respecting the production of any Animal or Other Insulin Products, or any forms of Animal or Other Insulin Products, which provision by its terms restricts or prevents any other company from importing any Animal or Other Insulin Products into, or manufacturing any Animal or Other Insulin Products within, the United States.

III

LICENSING OF EXISTING INSULIN PATENTS AND KNOW-HOW

It is further ordered, That:

A. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Domestic Company that states in its application its bona fide intention to engage in:

(a) the production of any Animal Insulin Products within the United States for sale within the United States or export sale from the United States, or
(b) the production of any Animal Insulin Products outside the United States for sale exclusively within the United States,

a non-exclusive, royalty-free license to produce and sell Animal Insulin Products under any part or all, as the applicant may request, Existing Patents and Existing Know-How pertaining to the Animal Insulin Products that the applicant states that it intends to produce. Each such license granted pursuant to this Paragraph III. A shall contain no time limitation or other restriction or limitation whatsoever, except that such license:

(1) May limit the production and sale of Animal Insulin Products produced using such licensed patents and know-how to: production within the United States for sale within the United States and export

sale from the United States; and production outside the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license and in making licensed know-how and written clarifications of licensed know-how available to the licensee (as provided in Paragraph I.5 above).

(4) May require the licensee to hold know-how received pursuant to the license confidential so long as such know-how is not otherwise in the public domain and not to communicate such know-how to anyone other than such governmental authorities as may be necessary to permit the licensee to produce and market Animal Insulin Products under the license.

(5) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(6) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage under the requested license in the production or sale of Animal Insulin Products within the United States, Lilly shall, within thirty (30) days from the date the written application was received by Lilly, submit to the Federal Trade Commission a written statement setting forth in detail its reasons for disputing the bona fide nature of such stated intention. The Commission may, at its election, request further information and itself determine the issue of whether such stated intention is bona fide, in which case the Commission's determination shall be final and binding upon both Lilly and the applicant. If the Commission instead declines to itself determine such issue, the applicant may, at its election, submit the issue for settlement by arbitration, which arbitration shall be conducted by and in accordance with the rules then effective of the American Arbitration Association.

B. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Foreign Company that states in its application its bona fide intention to engage in the production of any Animal Insulin Products within the United States for sale exclusively within the United States, a non-exclusive, reasonable-royalty license to produce and sell Animal Insulin Products under any part or all, as the applicant may request, Existing Patents and Existing Know-How pertaining to the Animal Insulin Products that the applicant states that it intends to produce. Each such license granted pursuant to this Paragraph III.B shall contain no time limitation or other restriction or limitation whatsoever, except that such license:

(1) May limit the production and sale of Animal Insulin Products produced using such licensed patents and know-how to production within the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license and in making licensed know-how and written clarifications of licensed know-how available to the licensee (as provided in Paragraph I.5 above).

(4) May require the licensee to pay a reasonable royalty for such licensed patents and know-how. Upon receipt of a written application for a license pursuant to this Paragraph III.B, Lilly shall advise the applicant, in writing within thirty (30) days, of the royalty it deems reasonable for the patents and know-how applied for. If the applicant and Lilly are unable to agree upon what constitutes a reasonable royalty within ninety (90) days from the date the written application for the license was received by Lilly, the applicant may, at its election, submit the issue of the royalty for settlement by arbitration, which arbitration shall be conducted by and in accordance with the rules then effective of the American Arbitration Association.

(5) May make reasonable provision for periodic inspection of the books and records of the licensee by an independent auditor, or other person acceptable to both Lilly and the licensee, who shall report to Lilly only the amount of the royalty due and payable and no other information.

(6) May require the licensee to hold know-how received pursuant to the license confidential so long as such know-how is not otherwise in the public domain and not to communicate such know-how to anyone other than such governmental authorities as may be necessary to permit the licensee to produce and market Animal Insulin Products under the license.

(7) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(8) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage under the requested license in the production of Animal Insulin Products for sale exclusively within the United States, Lilly shall follow the procedure for settling such disputes set forth in Subparagraph III.A.(6) above.

IV

LICENSING OF FUTURE INSULIN PATENTS AND KNOW-HOW

It is further ordered, That:

A. For a period of five (5) years after the date that the agreement containing this order is signed by Lilly, and in all agreements or licenses with other persons, research groups or companies other than Lilly, under which Lilly acquires or contracts to acquire rights to patents, applications or know-how respecting any Animal or Other Insulin Products, Lilly shall use its best efforts to have reasonable language empowering Lilly to grant the licenses contemplated by Paragraph IV.B below included in such agreements or licenses.

B. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Domestic Company that states in its application its bona fide intention to engage in the production of any Animal or Other Insulin Products within the United States for sale exclusively within the United States, a non-exclusive license to produce and sell Animal or Other Insulin Products under any part or all, as the applicant may request, of the following: Future Patents and Future Know-How acquired by Lilly from persons, research groups or companies other than Lilly and Lilly employees as of the date of such application for a license, that pertain to the Animal or Other Insulin Products that the applicant states that it intends to produce, and that Lilly has the legal capacity to license or sub-license as of the date of such application for a license. Each such license granted pursuant to this Paragraph IV.B shall contain no time limitation or other restriction or limitation whatsoever, except that such license:

(1) May limit the production and sale of Animal or Other Insulin Products produced using such licensed patents and know-how to production within the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license and in making licensed know-how and written clarifications of licensed know-how available to the licensee (as provided in Paragraph I.7 above).

(4) May require the licensee to pay a reasonable pro rata share of the amounts actually spent by Lilly in acquiring, or financing the research and development by such other persons, research groups or companies of, such licensed patents and know-how.

(5) May require the licensee to pay a royalty not to exceed the royalty, if any, that Lilly shall become obligated to pay such other persons, research groups or companies respecting sales of licensed products by the licensee.

(6) May make reasonable provision for periodic inspection of the

books and records of the licensee by an independent auditor, or other person acceptable to both Lilly and the licensee, who shall report to Lilly only the amount of the royalty due and payable and no other information.

(7) May require the licensee to hold know-how received pursuant to the license confidential so long as such know-how is not otherwise in the public domain and not to communicate such know-how to anyone other than such governmental authorities as may be necessary to permit the licensee to produce and market Animal or Other Insulin Products under the license.

(8) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(9) May contain provisions that require the licensee to grant Lilly, at a reasonable royalty, a reciprocal cross-license on a non-exclusive basis with respect to any part or all, as Lilly may request, rights under United States patents issued and know-how reduced to practice (including any United States patents which may issue on such know-how), that pertain to Animal or Other Insulin Products, that are acquired by the licensee from persons, research groups or companies other than the licensee and the licensee's employees after the date that the agreement containing this order is signed by Lilly, and that the licensee has the legal capacity to license or sub-license as of the date of its application to Lilly for a license under this Paragraph IV.B.

(10) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage under the requested license in the production and sale of Animal or Other Insulin Products exclusively within the United States, Lilly shall follow the procedure for settling such disputes set forth in Subparagraph III.A.(6) above.

C. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Domestic Company that states in its application its bona fide intention to engage in the production of any Animal or Other Insulin Products within the United States for sale exclusively within the United States, a non-exclusive license to produce and sell Animal or Other Insulin Products under any part or all, as the applicant may request, of the following: Future Patents, and Patents Issuing on Future Applications, covering innovations developed by Lilly or Lilly employees as of the date of such application for a license, that pertain to the Animal or Other Insulin Products that the applicant states that it intends to produce, and that Lilly has the legal capacity to license as of the date of such application for a license. Each such license granted pursuant to this Paragraph IV.C shall contain no time limitation or other restriction or limitation whatsoever, except that such license:

(1) May limit the production and sale of Animal or Other Insulin Products produced using such licensed patents to production within the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license.

(4) May require the licensee to pay a reasonable royalty for such licensed patents. Upon receipt of a written application for a license pursuant to this Paragraph IV.C, Lilly shall advise the applicant, in writing within thirty (30) days, of the royalty it deems reasonable for the patents applied for, and, with respect to patents not yet issued, Lilly shall so advise the applicant within thirty (30) days of issue. If the applicant and Lilly are unable to agree upon what constitutes a reasonable royalty within ninety (90) days thereafter, the applicant may, at its election, submit the issue of the royalty for settlement by arbitration, which arbitration shall be conducted by and in accordance with the rules then effective of the American Arbitration Association.

(5) May make reasonable provision for periodic inspection of the books and records of the licensee by an independent auditor, or other person acceptable to both Lilly and the licensee, who shall report to Lilly only the amount of the royalty due and payable and no other information.

(6) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(7) May contain provisions that require the licensee to grant Lilly, at a reasonable royalty, a reciprocal cross-license on a non-exclusive basis with respect to any part or all, as Lilly may request, rights under United States patents and United States patents which may issue on United States patent applications, that issue on patent applications filed after the date that the agreement containing this order is signed by Lilly, that pertain to Animal or Other Insulin Products, that cover innovations developed by the licensee or the licensee's employees, and that the licensee has the legal capacity to license as of the date of its application to Lilly for a license under this Paragraph IV.C.

(8) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage unde. the requested license in the production and sale of Animal or Other Insulin Products exclusively within the United States, Lilly shall follow the procedure for settling such disputes set forth in Subparagraph III.A.(6) above.

V.

REPORTING PROVISIONS

It is further ordered, That:

A. Within one hundred eighty (180) days of the effective date of this order, Lilly shall submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it has complied with this order.

B. For a period of five (5) years after the effective date of this order, Lilly shall submit in writing to the Federal Trade Commission a report concerning each instance in which a license is granted pursuant to this order, which report shall identify the licensee and set forth in detail all terms of the license. Such report shall be made within thirty (30) days after the granting of the license.

C. For a period of five (5) years after the effective date of this order, Lilly shall submit in writing to the Federal Trade Commission a report concerning each instance in which a license made pursuant to this order is cancelled, or in which a request for a license under this order is refused for reasons other than a dispute under Subparagraphs III.A.(6), III.B.(8), IV.B.(10) or IV.C.(8) concerning the applicant's "bona fide intention", which report shall set forth in detail the reasons for such cancellation or refusal. Such report shall be made within thirty (30) days after such cancellation or refusal.

D. Lilly shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Lilly which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other such change.

E. Lilly shall forthwith distribute a copy of this order to each of its operating divisions concerned with the purchase or sale of animal pancreas glands or with the licensing of patents or know-how.

IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 2 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 9016. Complaint, Feb. 25, 1975—Final Order, April 30, 1980*

This order requires, among other things, a Dallas, Texas retailer of sundry items, to cease coercing, intimidating, boycotting or taking other action against suppliers because they do not appear in the Gibson Trade Shows; further, the order prohibits certain Gibson officials and corporations from receiving brokerage commissions from a supplier while acting as a buyer for Gibson retail stores.

Appearances

For the Commission: *Andre Trawick, Jr., Robert G. Boomer, J.B. Brookshire* and *Juliam V. Buenger.*

For the respondents: *Bardwell D. Odum,* Dallas, Tex., *John M. Gillis, Gillis, Rogers & Taylor,* Dallas, Tex., *Robert E. Rader, Jr., McCarty & Wilson,* Ennis, Tex. and *Robert W. Steele* and *J. Wallace Adair, Howrey & Simon,* Washington, D.C.

INITIAL DECISION BY THEODOR P. VON BRAND, ADMINISTRATIVE LAW JUDGE

FEBRUARY 26, 1979

PRELIMINARY STATEMENT

[2]The complaint charges that the individual or "Gibson family" respondents, Herbert R. Gibson, Sr., Herbert R. Gibson, Jr., Gerald Gibson and Belva Gibson, and the "Gibson corporate respondents," Gibsons Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc., have violated Section 5 of the Federal Trade Commission Act and Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act.

The charges against Al Cohen Associates, Inc., Progressive Brokerage, Inc. and Barshell Inc.[1] are confined to allegations that these respondents violated Section 2(c) of the Robinson-Patman Act.

The complaint alleges that the Gibson family respondents have been engaged in the operation and control of a number of retail stores referred to in the complaint as "Gibson family-owned stores." Such stores, it is alleged, resell sundry types of products to the consuming public, including, but not limited to, soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware. The complaint further alleges that individual respondent Herbert R. Gibson, Sr. doing business as "Gibson Products Company" and "The Gibson Trade Show," together with or acting through respondent Gibson Products Co., Inc., sells or grants license or franchise agreements permitting individuals or corporations to use various Gibson trademarks, service marks and trade names, such as "Gibsons," "Gibsons Products Company," or "Gibson Discount Centers," in the operation of retail stores ("Gibson franchised stores"). It is further alleged that respondent Herbert R. Gibson, Sr., together with or acting through respondent Gibson Products Co., Inc., conducts trade shows for or attended by the various Gibson family or franchised stores.

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* Reported in 87 F.T.C. 1399 as to all parties.

[1] The Commission, by order dated June 17, 1976, accepted a consent settlement negotiated with respondents Progressive Brokerage, Inc. and Barshel', Inc.

The Section 5 charges against the Gibson family and corporate respondents are in two counts.

Count I alleges that, acting individually or in concert, the Gibson family and corporate respondents, in connection with the operation of the trade shows, have knowingly induced and received or received payments from suppliers as compensation or in consideration for services or facilities furnished by or through said respondents in connection with said respondents offering for sale, selling, soliciting, handling or arranging for the sale of products to Gibson family-owned stores and the Gibson franchise stores or resale thereof. [3]

Count I charges that the Gibson family and corporate respondents induced from most of their suppliers one or more of the following payments or considerations:

1. Payment for booth rentals;
2. Payment for services in connection with booth rental, including, but not limited to, electrical contracts or services and furnishings;
3. Payment for advertising in a booklet or a tabloid which was circulated among persons attending the Gibson Trade Show;
4. Special trade show prices on one or more of the suppliers' products offered for sale at the Gibson Trade Show;
5. Provision of personnel to prepare and attend the booth throughout the time the Gibson Trade Show was open;
6. Special billing terms on sales made at the Gibson Trade Show; and,
7. Special allowances on all sales made at the Gibson Trade Show calculated from a predetermined percentage of all such sales.

The complaint also alleges that respondents, pursuant to the operation of the trade show, have knowingly induced and received or received from suppliers the furnishing of services or facilities in connection with the selling, offering for sale, soliciting, handling, or arranging for the sale of products sold to Gibson family-owned stores and Gibson franchised stores or the resale thereof.

Count I charges that many suppliers participating in the Gibson Trade Show did not offer or otherwise make available to all of their customers competing with respondents in the sale and distribution of their respective products such payments, allowances, services, facilities or other things of value on proportionally equal terms. According to Count I, the Gibson family and corporate respondents knew or should have known that such payments or services were not offered or otherwise made available on proportionally equal terms to all other customers of such suppliers who competed with respondents. [4]

Count I, in short, alleges that respondents have induced and received or received promotional payments or services contrary to the policy of Sections 2(d) and 2(e) of the Robinson-Patman Act.

Count II of the complaint alleges that the Gibson family and corporate respondents, pursuant to combination, agreement, understanding or conspiracy with all or some of the Gibson family-owned stores and Gibson franchise stores, pursued a course of conduct eliminating or boycotting suppliers who did not grant all or some of the special allowances during or incident to the Gibson Trade Show as set forth in Count I of the complaint.

Count III charges that the Gibson family and corporate respondents have utilized the services of various manufacturers' representatives and brokers, such as respondents Progressive Brokerage, Inc., Barshell Inc. and Al Cohen Associates, Inc., who performed services for Gibson family respondents and corporate respondents by:

1. Furnishing information concerning market conditions;
2. Maintaining contact with various sellers;
3. Inspecting and selecting specified qualities and quantities of sundry products; and,
4. Negotiating purchases of said products.

These services, the complaint alleges, were performed by such manufacturers' representatives or brokers as agents or representatives of the Gibson respondents and under their direct or indirect control. Count III charges the Gibson respondents with accepting or receiving, and the broker respondents with paying or granting, commissions, brokerage or other compensation, in lieu thereof, in violation of Section 2(c) of the Robinson-Patman Act.

After extensive hearings, the record closed on November 10, 1978.

This matter is now before the undersigned for decision based on the allegations of the complaint, the answers, the evidence of record and the proposed findings of fact, conclusions and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having [5]considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the orders set out herein.

FINDINGS OF FACT

I. Respondents' Identity, Organization, Structure, and Business

A. Identity of Respondents and Their Related Businesses

1. Respondent H.R. Gibson, Sr. (Gibson, Sr.) is an individual who, in the period 1969 to November 1, 1972, operated and had a financial interest in retail stores operating under various trade names such as Gibson Discount Centers (Findings 5, 6).

The first Gibson Discount Center was founded by H.R. Gibson, Sr. and his wife Belva Gibson in Abilene, Texas in 1958 (CX 1329 Store Directory January-December 1973; Gibson, Sr. 5175).

2. The Gibson Discount Centers are retail discount stores selling to the general public (Moland 3543). Gibson Discount Centers, in the period 1969 to 1975, generally sold hard and soft goods, including beauty aids, health supplies, automotive supplies, housewares, toys and hardware (Gerald Gibson 4941–42).

3. Concurrently, in the period 1969 to November 1, 1972, Gibson, Sr. operated the Gibson Trade Show and licensed various franchisees to use Gibson trade names in their operation of retail stores (Gerald Gibson 4885; Findings 4, 25, 44).

4. Gibson, Sr., in the period 1969 to October 31, 1972, did business under the trade or "d/b/a" name of Gibson Products Company (Gerald Gibson 4784, 4856). He used the Gibson Products Company trade name while doing business in his individual capacity in conducting the trade show and licensing others to utilize Gibson trade names in their retail store operations (CX 1059, 1061, 1063, 1065, 1069, 1071, 1040A–C; Gerald Gibson 4784, 4856; Gibson, Sr. 7222).

5. Gibson, Sr. and his wife, respondent Belva Gibson, in the period 1969 to October 31, 1972, were majority stockholders in the following corporations owning and operating retail discount stores under the Gibson name (Gibson, Sr. 5299; Stipulation April 13, 1978):

Gibson Products Company, Inc.
Gibson Products of Abilene
Gibson Products Co., Inc.
Gibson Products of Big Spring [6]
Gibson Products Co., Inc. of Lubbock
Gibson Products Co., Inc. (a Wyoming corporation)
Gibson's Discount Centers, Inc.[2]

In the period 1969 through October 31, 1972, H.R. Gibson, Sr. and Belva Gibson also had a minority interest in certain other corporations operating retail stores under the Gibson name (Gibson, Sr. 5567–68). They had a minority interest in the stores at Shreveport, Louisiana, Bruton Terrace in Dallas, Texas, Hobbs, New Mexico and some other locations (Gibson, Sr. 5568).

6. Gibson, Sr. hired the store managers of those stores in which he had a majority interest. His overriding concern was with their overall profitability (Gibson, Sr. 5219–20, 5583), as is evident in the following statement: "My main thing that I watched for all the time is to see that the store was making money" (Tr. 5583). Although day to day operating decisions were left to the store managers, Gibson, Sr. was actively involved in the operation of these stores. As he stated:

> The policy decisions that I made was pertaining to the financial affairs of the store. What I wanted was a store that would make money.
>
> They would furnish me with the financial statements of the store. Anytime they didn't make money, I had to do something about it. Might get a new manager I would try to get the store to making money. That was my policy decisions (Tr. 5573).

7. Respondent Gerald Gibson is the son of H.R. Gibson, Sr. In the period 1969 to 1972, he owned Gibson Products Company of Paris, Inc., Gibson Products Company of Shreveport, Inc. and Gibson Products Company of Bruton Terrace, Inc., as well as a minority interest in Gibson Products Company of Garland, Inc., Gibson Products Company of Pueblo, Inc. and Gibson Products Company of Temple, Inc. These corporations operated retail stores at the locations indicated (Gerald Gibson 4844–45; Tr. 5050–51). [7]

Gerald Gibson, in the same period, also had an advertising business which he operated as a proprietorship or "d/b/a operation" under the name G&G Advertising Agency[3] (Gerald Gibson 4846–48).

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[2] During the period 1969 to November 1, 1972, H.R. Gibson, Sr. and Belva Gibson (individually and/or collectively) owned in excess of 50% of the stock of the above corporations using the Gibson name. And, during the period 1971 to November 1, 1972, Gibson's Discount Centers, Inc. owned all of H.R. Gibson, Sr.'s and Belva Gibson's shares in the companies listed above.

8. Respondent H.R. Gibson, Jr. is the son of Gibson, Sr. In the period 1969 to November 1, 1972, he was in the retail business and owned the majority of the stock in corporations operating retail stores under the trade name of Gibson's Discount Centers in Hutchinson, Kansas and San Antonio, Texas. In the same period, he owned some stock in corporations operating Gibson retail stores in Pueblo, Colorado, Richardson, Texas, Temple, Texas, Bruton Road in Dallas, Texas, as well as Plano and Fort Worth, Texas (H.R. Gibson, Jr. 5626, 5677, 5678–5679).

9. As a general rule, with some exceptions, the Gibson stores are separately incorporated (Gerald Gibson 5076). The corporate name of such corporations is frequently "Gibson Products Company" with the town where the store is located included in the corporate name, *e.g.*, "Gibson Products Co., Inc. of Lubbock" (Gerald Gibson 4799; JR 20 pp. 4–5; Stipulation April 13, 1978).

10. In 1971, the Gibson stores owned by Gibson, Sr., his sons and other Gibson franchisees collectively did approximately $1.6 billion of business (Gibson, Sr. 5529).

11. The stock of the corporate respondents and certain other corporations engaged in retailing was closely held, in the period 1969 to October 31, 1972, by members of the Gibson family. Control over the respondent corporations and some of the retail corporations resided primarily in those members of the Gibson family who are individual respondents herein.

12. In the period 1969 to October 31, 1972, there was extensive overlap in the directors and officers of the corporate respondents, as well as certain other corporations which operated Gibson retail stores. The overlap resulted from the offices held by the individual respondents:[4] [8]

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[3] Various Gibson stores, in the period 1969 to 1973, used the services of G&G Advertising. This was true of the majority of the Gibson stores in Texas (Gerald Gibson 4847–48). Gerald Gibson and his brother, H.R. Gibson, Jr., as one part of G&G's business, also prepared a tabloid (Gerald Gibson 4849). G&G Advertising stopped doing business about 1974 (Gerald Gibson 4848).

[4] The chart is prepared from Appendix A.

GIBSON DISCOUNT CENTERS, INC.

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Incorporators	1969	x		x	x
Directors	1969	x	x	x	x
	1971	x	x	x	x
	1972	x	x	x	x
	1973			x	x
	1974			x	x
	1975			x	x
Officers	1971	x	x	x	x
	1972	x	x	x	x
	1973			x	x
	1974			x	x
	1975			x	x

GIBSON WAREHOUSE, INC.

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1962	x	x	x	
	1971	x	x	x	
	1972	x	x	x	
Officers	1971	x	x	x	
	1972	x	x	x	

IDEAL TRAVEL AGENCY, INC.

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibso
Directors	1962*/		x		
	1970	x	x		
	1971	x	x		
	1972	x	x	x	
Officers	1970	x	x		
	1971	x	x		
	1972	x	x	x	

*/ In the year 1962, the exhibit listed H.R. Gibson as a director but did not state whether it was Sr. or Jr.

GIBSON PRODUCTS COMPANY

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibso
Director	1970	x	x		
	1971	x	x	x	
	1972			x	x
	1973			x	x
Officers	1970	x	x		x
	1971	x	x	x	
	1972			x	x

GIBSON PRODUCTS COMPANY OF SAN ANTONIO, INC.

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibso
Directors	1970		x	x	
	1971		x	x	
	1972		x	x	x
Officers	1970		x	x	
	1971		x	x	
	1972		x	x	x

GIBSON PRODUCTS COMPANY INC. OF GARLAND

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1971	x		x	x
Officers	1971	x		x	x
	1972	x		x	x

GIBSON PRODUCTS COMPANY INC. OF RICHARDSON

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970	x		x	
	1971	x		x	
	1972	x		x	
Officers	1970	x		x	
	1971	x		x	
	1972	x		x	

GIBSON PRODUCTS COMPANY OF SHREVEPORT, INC.

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970	x			x
	1971	x			x
	1972			x	x
Officers	1970	x		x	x
	1971	x		x	x
	1972			x	x

GIBSON PRODUCTS COMPANY, INC. OF PLANO

	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1971	x**/	x*/	x*/	x**/
Officers	1971	x**/	x*/	x*/	x**/

*/ Indicates that they were elected at meetings on April 28 and October 26, 1971.

**/ Herbert R. Gibson, Sr. was elected on April 28, 1971, and Gerald Gibson was elected at the October 26, 1971 meeting.

[11]13. Respondent Gibson Products Company, Inc. is a Texas corporation, formed on or about January 28, 1936 (CX 5). Its principal place of business since 1975 has been Ft. Worth, Texas, where it operates a retail discount center (Gerald Gibson 4695). Prior to 1975, its principal place of business was 1228 E. Ledbetter St., Dallas, Texas, where it also operated a retail discount center (JR 12, Gerald Gibson 4695–96.[5] See also Gibson, Sr. 5162, 5187, 5381).

14. Respondent Ideal Travel Agency, Inc., formerly Gibson Travel Service, Inc., is a Texas corporation, formed on or about April 23, 1962 (CX 3). Ideal's office was located at 519 Gibson St., Seagoville, Texas (Leverett 3790). In the period 1969 to November 1, 1972, Ideal operated as a travel agency and worked with the Gibson Trade Show, often collecting booth fees as the agent of H.R. Gibson, Sr. (H.R. Gibson, Jr. 5636–37, 5659–60; Gerald Gibson 4865–66). Ideal, in that period, also received some show fees from suppliers participating in the Gibson Trade Show (Gibson, Sr. 5193–94). It is now dissolved (H.R. Gibson, Jr. 5736–37; Gerald Gibson 4704).

15. Respondent Gibson Warehouse, Inc. is a Texas corporation, formed on or about May 28, 1962 (CX 4). Its function was to warehouse and resell merchandise. It is now dissolved (H.R. Gibson, Jr. 5637–38).

16. Respondent Gibson Discount Centers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas (CX 2). It was incorporated on or about October 6, 1969 (CX 2). The principal place of business of Gibson Discount Centers, Inc. is 519 Gibson St., Seagoville, Texas (CX 44). Gibson Discount Centers, Inc. originally functioned as a holding company to hold the assets of H.R. Gibson, Sr. and Belva Gibson (Gerald Gibson 5119; Gibson, Jr. 5632). It was formed by Gibson, Sr. to get out of the retail business (H.R. Gibson, Jr. 5626–28). It is currently a wholly-owned subsidiary of Gibsons, Inc. (Finding 28).

17. Respondent Gibsons, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas. It was formed on or about October 25, 1972 (CX 1). Its principal place of business is 519 Gibson St., Seagoville, Texas (Gerald Gibson 4690). Gerald and Herbert Gibson, Jr. formed Gibsons, Inc. in order to buy out their father's retail business and to put the corporations and interests owned by them together into one company (Gerald Gibson 5051–52; H.R. Gibson, Jr. 5680). [12]

18. Gibson Distributors, Inc. is a wholly-owned subsidiary of Gibsons, Inc. It opened for business in 1975, and buys, sells and warehouses merchandise (Findings 28, 35, 36, 55).

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[5] The Dallas store on Ledbetter Street was closed in 1973 or 1974 (Gerald Gibson 4696).

19. Dixie Laboratories, Inc. conducts respondents' manufacturing business, which includes the manufacture of health and beauty aids (H.R. Gibson, Jr. 5692). Dixie Laboratories, which sold to Gibson and non-Gibson stores, also sold private label goods under the Gibson brand (Gerald Gibson 4871).

20. Rack Suppliers, Inc. is a Texas corporation engaged in the business of purchasing and reselling phonograph records, tapes and related products (Gibson, Sr. 5215). It is a wholly-owned subsidiary of Gibsons, Inc. (H.R. Gibson, Jr. 5667).

21. Gibson Data Processing Service, which has its principal office and business location at Seagoville, Texas (H.R. Gibson, Jr. 5724), is now, and for some time past has been, engaged in performing accounting functions for various Gibson retail stores (Gerald Gibson 4878).

22. Gibson Discount Printing was located in the warehouse at respondents' Seagoville complex (Gerald Gibson 4876). In the period 1969 to 1974, it printed show sheets for Gibson, Sr.'s trade show (Gerald Gibson 4877).

23. Gibson Development Corporation is now, and for some time past has been, engaged in the business of a holding corporation for various tracts of land (Gerald Gibson 4885; Gibson, Sr. 5215).

24. Respondent Al Cohen Associates, Inc. is a corporation engaged in the business of providing sales representation to manufacturers (Finding 425).

B. Divestiture of Retail Assets by H.R. Gibson, Sr. and Belva Gibson to H.R. Gibson, Jr. and Gerald Gibson

25. On November 1, 1972, H.R. Gibson, Jr. and Gerald Gibson purchased all or most of Gibson, Sr.'s retail store holdings (H.R. Gibson, Jr. 5644). The transfer of such assets to Gerald and H.R. Gibson, Jr. was accomplished by a sale of Gibson Discount Centers, Inc.'s stock to Gibsons, Inc. (H.R. Gibson, Jr. 5667; Gerald Gibson 5052, 5119). The effective date of this stock transfer was November 1, 1972 (H.R. Gibson, Jr. 5680–81).

H.R. Gibson, Jr. also purchased the assumed name, Gibson Products Company, from his father on November 1, 1972 (H.R. Gibson, Jr. 5702–A). H.R. Gibson, Sr. notified franchisees [13]licensed to use Gibson trade names in the operation of retail stores that, as of October 31, 1972, such franchise agreements were cancelled and further operation under the Gibson name would have to be arranged with the new owner of such trade names, Gibson Discount Centers, Inc., through its president, H.R. Gibson, Jr. (SR 156, McCrea 6816).

The sale of the retail assets by Belva Gibson and Gibson, Sr. to their sons was publicized and announced at a banquet attended by manufacturers, manufacturers' representatives and Gibson franchisees (Gerald Gibson 5085; Levitt 1971–72; Hardiman 7872).

C. Respondents' Operations after October 31, 1972

26. H.R. Gibson, Sr., on November 1, 1972, registered the name The Gibson Trade Show as a "d/b/a." This name was not registered prior to November 1, 1972 (Gibson, Sr. 5216). He continued to operate the trade show after October 31, 1972 (Gerald Gibson 4885–86) under the name "The Gibson Trade Show."

27. The organization of Gibsons, Inc., beginning in November 1972, was completed in 1976 (Gibsons, Inc. Annual Report 1976; JR 20 p.2).

The voting stock in Gibsons, Inc. has always been in the hands of Herbert Gibson, Jr. and Gerald Gibson. Gibson, Sr. has never owned any voting stock in Gibsons, Inc., nor has he been an officer or director of that company (CX 1, 985–92, 1271–73; Gerald Gibson 5078). The record shows no management control by Gibson, Sr. over Gibsons, Inc. (Banks 7786; Cheek 7770).

In the period November 1, 1972 through 1975, 100% of the voting stock of Gibsons, Inc. was owned by H.R. Gibson, Jr. and Gerald P. Gibson. During that period, Gibsons, Inc., in turn, wholly-owned Ideal Travel Agency, Inc., Gibson Discount Centers, Inc., Gibson Warehouse, Inc. and Gibson Products Company, Inc. of 1228 E. Ledbetter St., Dallas, Texas (H.R. Gibson, Jr. 5736–37, 5739–40; JR 12 See Appendix B). Gibsons, Inc. owned Gibson Warehouse, Inc. and Ideal Travel Agency, Inc. until the two companies were dissolved (Gerald Gibson 5053; JR 12).

H.R. Gibson, Jr. and Gerald Gibson currently own 100% of the voting stock in Gibsons, Inc. (JR 12), with each owning 50% of such stock (Gerald Gibson 5078). And, Gibsons, Inc. continues to be a holding company for the stock of other corporations (H.R. Gibson, Jr. 5667). Gibsons, Inc. is in the retailing, manufacturing and real estate business (H.R. Gibson, Jr. 5667–68). Its principal business is the operation and licensing of retail department discount stores (JR 20 p. 3). [14]

28. At present, the subsidiaries of Gibson, Inc. are Gibson Distributors, Inc., Gibson Discount Centers, Inc., Dixie Laboratories, Inc., Gibson Print Shop Office Supply, Inc., Rack Supply, Inc. and Gibson Data Processing Service (Gerald Gibson 4972). Currently, the various stores in which Gerald and Herbert Gibson, Jr. have an ownership interest are held through Gibson's Discount Centers, Inc. (Gerald Gibson 4972–73).

As of December 31, 1976, the active divisions and corporations comprising Gibsons, Inc. were the following:

GIBSONS INC. (The Parent Company)

Franchising Division
(Not incorporated—all franchise operations)

Dixie Laboratories
(Corporation Mfg. and Sales of Health and Beauty Aids)

Rack Suppliers, Inc.
(Distributor of Records and Tapes)

Gibson Printing and Office Supply Inc.

Equity Development Corporation
(Real Estate)

Gibson Development Corporation
(Real Estate)

Gibson Distributors Inc.
(Warehouse and Distribution)

Gibson's Discount Centers, Inc.
(Parent Company for retail store operations) (JR 20).

29. Gibson's Discount Centers operate in 29 states. As of December 31, 1976, Gibsons, Inc. operated 43 stores through its subsidiary, Gibson's Discount Centers, Inc. In addition, 614 licensed stores were operated under the Gibson trade name. Such licensees pay a monthly fee for use of the Gibson trade name (JR 20 p. 3, Gibsons Inc. Annual Report 1976).

30. In 1975, Gibsons, Inc. and its subsidiaries had assets of $63,908,000; the corresponding figure for 1974 was $54,588,000 (JR 20 p. 8). The consolidated net sales in 1975 and 1974 were, respectively, $135,730,040 and $127,831,833 (JR 18).

31. Gibson's Discount Centers, Inc., as a subsidiary of Gibsons, Inc., now has all the retailing business as well as the franchise business (H.R. Gibson, Sr. 5692). H.R. Gibson, Jr. and Gerald Gibson own all the stock in Gibson's Discount Centers, Inc. through the parent company (H.R. Gibson, Jr. 5691). All of the various corporation that own or operate stores are held, in turn, by Gibson's Discount Centers, Inc. (Gerald Gibson 4972). [15]

32. Gibson's Discount Centers, Inc. has licensed the use of the Gibson trade names since November 1, 1972. H.R. Gibson, Jr. signs all licensing agreements (H.R. Gibson, Jr. 5668).

33. In 1974 and 1975, the approximate sales volume of stores whose

stock was held wholly or in part by Gibson's Discount Centers, Inc. was approximately $115 to $120 million (Gerald Gibson 5022). The pertinent figure for 1976 was $117 million and, for 1977, about $110 million (Gerald Gibson 5023). In 1976, there were about 43 stores in this category, while in 1975 and 1974, the figure was 44 (Gerald Gibson 5023).

34. The retail operations controlled by Gibson's Discount Centers, Inc. consist of the following:

UNINCORPORATED DIVISIONS

Gibson's Discount Center —Plainview, Texas
Gibson's Discount Center —Ponca City, Oklahoma
Gibson's Discount Center —Amarillo, Texas
Gibson's Discount Center —Sulphur Springs, Texas
Gibson's Discount Center —Abilene, Texas
(841 Judge Ely Blvd.)

MULTI-STORE CORPORATIONS:

Gibson's Discount Centers, Inc. (A New Mexico Corporation)
Gibson's Discount Center —Portales, New Mexico
Gibson's Discount Center —Clovis, New Mexico

Gibson Products Co. of Hobbs, Inc.
Gibson's Discount Center —Hobbs, New Mexico
Gibson's Discount Center —Lovington, New Mexico

Gibson Products Co., Inc. of Lubbock
Gibson's Discount Center —909 50th Street
Gibson's Discount Center —5005 Slide Road
Gibson's Building Supply —3117 Avenue H

Gibson Discount Centers of Roswell, Inc.
Gibson's Discount Center —2800 North Main Street
Gibson's Discount Center —110 West McGaffey

Gibson Products, of Shreveport, Inc.
Gibson's Discount Center —3707 Greenwood Road
Gibson's Discount Center —2600 Waggoner

Gibson Products, Inc. of Temple, Texas
Gibson Discount Center —Temple, Texas
Gibson's Discount Center —Terrell, Texas
Gibson's Discount Center —Waxahachie, Texas [16]

Gibson Products Co., Inc. (a Wyoming Corporation)
Gibson's Discount Center —600 East Carlson, Cheyenne, Wy.
Gibson's Discount Center —2717 East Lincolnway, Cheyenne, Wy.
Gibson's Discount Center —Laramie, Wy.

Greeley Gibson Products Co., Inc.
Gibson's Discount Center —Greeley, Colo.
Gibson's Discount Center —Longmont, Colo.

Gibson Products of San Antonio, Inc.
Gibson's Discount Center —2627 S.W. Military Pkwy.
Gibson's Discount Center —1331 Bandera

SINGLE STORE CORPORATIONS

Gibson Products Company of Abilene (2550 Barrow Street)
Gibson Products Company, Inc. of North Abilene (3202 N. First Street)
Gibson Products Co. of Albany, Inc.
Gibson Products of Batesville, Inc.
Gibson Products Co. Inc. of Big Springs
Gibson Products Company, Inc. of Bruton Terrace (Dallas)
Gibson's Fort Worth South, Inc. (5701 Crowley Rd.)
Gibson Products Inc. of Garland
Gibson Products Company, Inc. (Haltom City)
Gibson Products Company, Inc. of Hutchinson (Ks.)
Gibson Products Company of Newton, Inc. (Ks.)
Gibson Products Co., Inc. of Paris (Greenville, Tx.)
Gibson Products Company, Inc. of Plano, Tx.
Gibson Products Co. Inc. of Pueblo
Gibson Products Inc. of Richardson, Tx.
Gibson Products Company, Inc. of Western Hills (7901 Highway 80 West, Ft. Worth, Tx.)
Gibson Products Company, Inc. of North San Antonio (JR 20 pp. 4–5).

35. Gibson Distributors, Inc. is engaged in the buying and selling of merchandise. It opened for business in 1975, and since that time has been a subsidiary of Gibsons, Inc. (Gerald Gibson 5005–06). Gibson Distributors, Inc. resells merchandise mainly to Gibson's Discount Centers and some garden centers. There may have been a few sales to other companies (Gerald Gibson 5006).

36. Before November 1, 1972, the purchasing decisions of the stores currently controlled by Gibsons, Inc. or Gibson's Discount Centers, Inc. were made at the store level by the store manager (Gerald Gibson 5053–56; H.R. Gibson, Jr. 5680–81). After [17]that date, buying decisions for those stores were centralized in Gibson Distributors, Inc. (Gerald Gibson 5062–63; H.R. Gibson, Jr. 5761; Skelly 7932–33).

Gibson Distributors, Inc. has made purchases from the lines represented by the Gibson Trade Show for the forty-two stores under the ownership of H.R. Gibson, Jr. and Gerald Gibson as well as purchases from other lines (Skelly 7951). Gibson Distributors, Inc. is listed as a customer of the Gibson Trade Show in the Gibson Trade Show's Customer Information List, 1975 edition, published by Gibson, Sr. (CX 1330 p. 28).

D. Respondents' Store Directories

37. In the period 1969 to 1975, respondents prepared store directories containing a listing of the various stores operating under one of the Gibson trade names (H.R. Gibson, Jr. 5708). Prior to November 1, 1972, the directories were published by H.R. Gibson, Sr. in his capacity as franchisor of various persons and entities licensed to use the Gibson name. After that date, they were published by Gibson's Discount Centers, Inc. which, since that time, has taken over the licensing of such stores (H.R. Gibson, Jr. 5708, 5711).

38. Respondents mailed store directories to manufacturers and to retailer customers of the Gibson Trade Show (Gibson, Sr. 5257–58; Gerald Gibson 5084). And, they were available in the Gibson Trade Show (Regeon 6664–66; B. Bradsby 6803). The purpose of such store directories was to enable manufacturers and/or other retailers to determine the proper person to contact in a particular store on matters such as bills (Gerald Gibson 4803–04).

39. The record contains CX 41, 1327 and 1328, which are store directories published in 1970 and 1971 by H.R. Gibson, Sr. while doing business under the Gibson Products Company trade name.[6] All three directories represented under the main heading, "Seagoville Executives," that H.P. Gibson, Sr. was Chairman of the Board, Mrs. H.R. Gibson, Sr. was Secretary, H.R. Gibson, Jr. was President and Gerald Gibson was Executive-Vice President of Gibson Products Company. A number of individuals were listed as home office personnel of the Gibson Products Company under the heading, "Home Office." And, trade show personnel were listed with the lines for which they were responsible under the heading, "Buyers."

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[6] CX 41 is the Store Directory for July-December 1970; CX 1327 is the Store Directory for January-December 1971; and, CX 1328 is the Store Directory for July-December 1971 (See Appendix C and D).

The cover page on CX 1327, the store directory for January-December 1971, shows the following: [18]

STORE DIRECTORY

JANUARY - DECEMBER

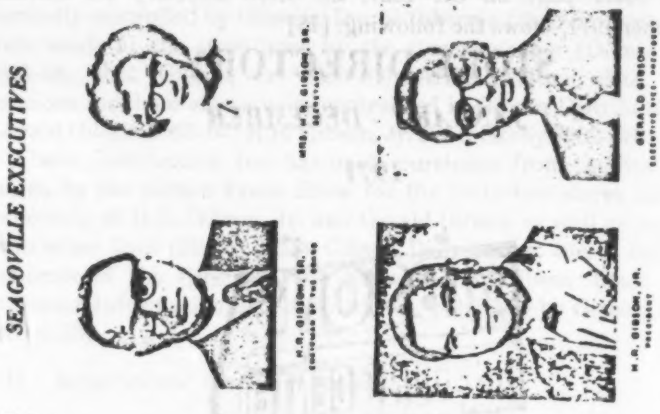
1971

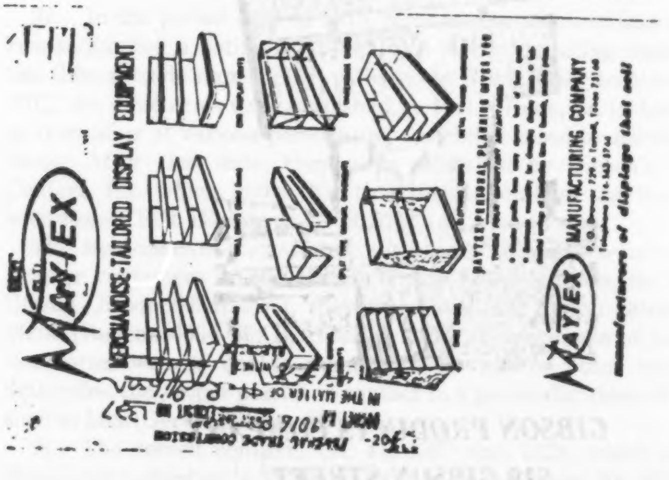
GIBSONS
DISCOUNT CENTER
WHERE YOU BUY

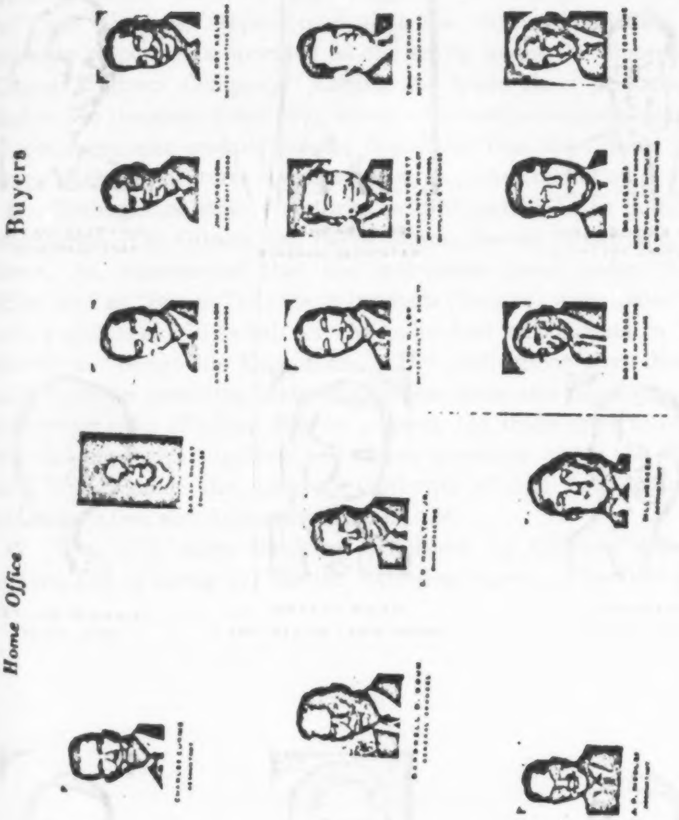
GIBSON PRODUCTS COMPANY
519 GIBSON STREET
SEAGOVILLE, TEXAS 75159

A/C 214 287-2570

[19]CX 1327 represents the following under the headings, "Seagoville Executives," "Home Office" and "Buyers": [20]


SEAGOVILLE EXECUTIVES
H.R. GIBSON, SR.
MRS. H.R. GIBSON, SR.
H.R. GIBSON, JR.
GERALD GIBSON


MAYTEX
MERCHANDISE-TAILORED DISPLAY EQUIPMENT
MAYTEX PERSONAL PLANNING GIVES YOU
MAYTEX
MANUFACTURING COMPANY
manufacturers of displays that sell
FEDERAL TRADE COMMISSION
9016
IN THE MATTER OF


Buyers
Home Office

BOB BROUGHTON
DIST. STORE SECURITIES

BILL BARNES
WAREHOUSE MANAGER

CHARLIE DAVIS
RACK SUPPLIERS

TOM FERRELL
TRAFFIC MANAGER

DAVIS FOSTER
ADVERTISING - DALLAS AREA

MARGIE KAUTZ
IDEAL TRAVEL

B. W. HUDSON
DIXIE LABORATORIES

BILL REA
ADVERTISING - TABLOID

LOYD REECE
GIBSON PRINTING CO.

[23]40. The listing together of the various individuals in the store

directories under the headings, "Seagoville Executives," "Home Office" and "Buyers," represented that the various individual and corporate respondents operated as one entity under the umbrella of "Gibson Products Company." Listing the trade show personnel as "Buyers" in the store directories, which contained a complete listing of Gibson stores, also created the net impression that the Gibson Trade Show and the retail stores constituted an integrated operation.[7]

41. Through the store directories in 1970 and 1971, the individual respondents, H.R. Gibson, Sr., Belva Gibson, Gerald Gibson and H.R. Gibson, Jr., represented that the individuals listed under "Home Office" and as "Buyers" of Gibson Products Company were under their control and acted in behalf of the individual respondents in their capacity as "Seagoville Executives."[8] The publications were disseminated to stores operating under the Gibson name and suppliers of the trade show alike (Finding 38). As a result, the trade show buyers in their dealings with suppliers and stores operating under the Gibson name acted under the apparent authority of the four individual respondents (see also Appendix C and D). [24]

42. The 1973 store directory published by Gibson's Discount Centers, Inc. (Finding 37) has the following legend on its first page:

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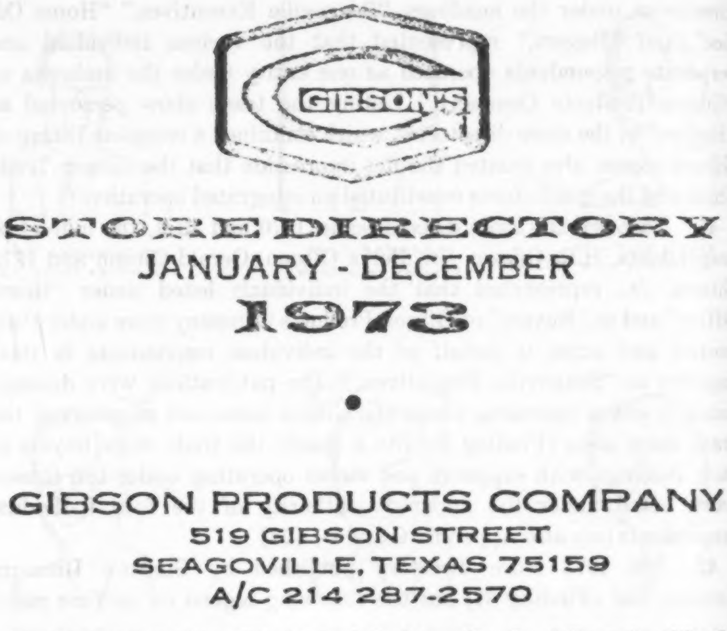
[7] It is true that Gibson Products Co. was Gibson, Sr.'s trade name, under which he did business, and not a corporation. Nevertheless, the explanation that such representations were an error for which the respondents are not responsible is not persuasive (Gibson, Sr. 5254, 5376-78, 5599-5602, 5602-03. See also Gerald Gibson 4789-90). It is improbable that, with three store directories in the space of two years making essentially the same representations, respondents did not intend that such representations be made. There is no evidence in this record that any respondents made any statements to the trade retracting the representations which it is asserted were made in error. CX 1877 and 1406C, stationary used by Gibson, Sr. and Belva Gibson with the letterhead "Home Office Gibson Products Company, 519 Gibson Street, Seagoville, Texas 75159," further indicate that the representations in the store directories did not result from error. In this regard, see also CX 1829, showing that, in 1973, the store directory for that year contained the legend, "Store Directory . . . . Gibson Products Company. . . .," followed immediately with photographs of H.R. Gibson, Jr. and Gerald Gibson captioned "President" and "Executive Vice President," respectively (See Finding 42).

[8] The identical representations in three store directories in a two year period compels the inference that they were made with the knowledge and consent of the four individual respondents.



GIBSON'S

STORE DIRECTORY

JANUARY - DECEMBER

1973

GIBSON PRODUCTS COMPANY

519 GIBSON STREET

SEAGOVILLE, TEXAS 75159

A/C 214 287-2570

The page containing this legend is immediately followed with the pictures of Gibson, Sr.'s sons and the following captions "H.R. GIBSON, JR. PRESIDENT" and "GERALD P. GIBSON EXECUTIVE VICE PRESIDENT" (CX 1329).

43. A 1975 store directory, published by Gibson's Discount Centers, Inc., represented that H.R. Gibson, Sr. and Belva Gibson were "Founders — Now Retired" of that corporation (CX 44).

E. The Franchise Operation

44. H.R. Gibson, Sr. licensed persons and firms to use various Gibson trade names in the operation of retail stores in his individual capacity while doing business under the name Gibson Products Company in the period 1969 to October 31, 1972 (Findings 3, 4, 25). The licensing or franchising operation was taken over by Gibson Discount Centers, Inc. ("GDCI") on November 1, 1972. GDCI is a wholly-owned subsidiary of Gibsons, Inc.; its voting stock is controlled 100% by H.R. Gibson, Jr. and Gerald Gibson, the sons of Gibson, Sr. (Findings 25, 27, 28, 31, 32). [25]

45. The registered trade names which Gibson's Discount Centers, Inc. licenses for use are Gibson Discount Centers and Gibson Products Company (H.R. Gibson, Jr. 5696-97).

46. There are in excess of 100 or 150 entities who own either a single Gibson store or a group of such stores (Gerald Gibson 5076–77). Certain store owners control more stores under the Gibson name than either Gerald Gibson or Herbert Gibson, Jr. (Gerald Gibson 5077). The biggest group is the Pamida group, which owns and operates in excess of 200 stores. West Brothers owns 20 to 25 stores, and several other groups own 10 to 15 stores (Gerald Gibson 5077).

47. The franchise fee is paid monthly and is based on the number of square feet in the store (Gibson, Sr. 5392–93). In 1965, the license fee ranged from $150 to $200 per month, depending on the area of the store (SR 155). At present, the licensing fee ranges from $225 to $275 per month per store (H.R. Gibson, Jr. 5696).

48. Currently, every Gibson store operates by virtue of a license from GDCI. Each store, including those owned by members of the Gibson family, pays a licensing or franchise fee (Gerald Gibson 5076; H.R. Gibson, Jr. 5690). This was the case before as well as after November 1, 1972 (H.R. Gibson, Jr. 5690).

49. Gibson, Sr. stressed that prospective franchisees needed adequate financing to run their stores (Gibson, Sr. 5390). Since November 1, 1972, the requirements to become a Gibson franchisee have basically been financial stability and some experience in retailing (H.R. Gibson, Jr. 5669). If a franchisee became bankrupt, the licensing agreement was cancelled (Gibson, Sr. 7278).

50. Both Gibson, Sr. and GDCI entered into franchise contracts with persons or entities licensed to use Gibson trade names in the operation of retail stores (SR 155, Munden Deposition Exhibit RX 1; SR 157, 159, 160, 161, 162A–C; CX 1447A–D). GDCI continues to enter into such contracts.[9]

51. Gibson, Sr.'s franchise agreements provided that the licensor would furnish the licensees of his trade names with the benefit of volume purchasing power and advice as to merchandising. Typically, such contracts provided: [26]

> GIBSON shall give GRANTEE the benefit of volume purchasing power, advise as to merchandising, and render other assistance to GRANTEE as may be found appropriate by GIBSON in his sole discretion (Munden Deposition Exhibit RX 1. See also SR 155, 160, 161, 162A–C, 166; CX 1428–29).

52. Gibson, Sr. put "quality control" provisions into such contracts in the period 1966 to 1967 (Gibson, Sr. 7223). Typically, such a provision provided:

> In consideration of the grant by GIBSON to GRANTEE of the right to use the

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[9] Initially, Gibson, Sr. had oral or "hand shake" agreements with his franchisees. Eventually, however, he had written agreements with all of them (Gibson, Sr. 7223, 7258).

> trademarks, service marks and trade names of GIBSON, namely "Gibson's", "Gibson" with design, "Gibson Products Company" and "Gibson Discount Center", GRANTEE conveys to GIBSON and GIBSON specifically retains the absolute, complete and final right of quality control over all products and items sold and all services rendered by GRANTEE to customers of GRANTEE's *Gibson Products Company of Brownfield, Texas*, and GRANTEE agrees to discontinue immediately the sale of any products or items or the rendering of any services under any one or more of the aforesaid marks and names if the quality thereof is disapproved by GIBSON (Munden Deposition Exhibit RX 1. See also SR 162A–C; CX 1429).

53. The cancellation provisions of such licensing agreements provided that they could be cancelled at any time within ninety days and that, upon notice of termination, the licensee was to immediately discontinue use of the Gibson trade names. A typical provision provided:

> This agreement may be cancelled at any time within *Ninety (90) days* by written notice sent registered mail, by either party.
>
> Upon termination of this agreement, GRANTEE agrees that he, or they, will immediately discontinue the use of "Gibson Products Company" and/or "Gibson Discount Center", and all other trademarks and/or service marks of GIBSON, [27]specifically including "Gibson's" and "Gibson" with design, and will not thereafter use same (Munden Deposition Exhibit RX 1. See also SR 155, 160, 161, 162A–C).

54. GDCI, in its contracts with licensees, also contracts to furnish them with merchandising advice and reserves to itself the right of quality control over the products sold and services rendered by the licensees (CX 1447). GDCI's standard licensing contract, in use since November 1, 1972, provides in pertinent part:

> 9. GIBSONS shall in connection with this Agreement render such assistance to LICENSEE in connection with the operation of his discount business as may be found appropriate by GIBSONS after request by LICENSEE, including advice as to merchandising and other business practices so as to enable the LICENSEE to benefit from the knowledge and experience of GIBSONS in the discount business.
>
> 10. LICENSEE agrees that GIBSONS retains the absolute, complete and final right of quality control over all products and items sold and over all services rendered by LICENSEE to customers of LICENSEE'S discount business and associated enterprises using the Service Marks and Trade Names licensed hereby to see that the high standards of GIBSONS DISCOUNT CENTERS throughout the United States of America are maintained and to protect the property rights of GIBSONS in the Service Marks and Trade Names set forth in Paragraph 1 hereof. The LICENSEE further agrees that if GIBSONS notifies LICENSEE that GIBSONS disapproves of the quality of products, items, or services sold or rendered in connection with sale of items or products in the discount business of LICENSEE, that LICENSEE will immediately discontinue the sale of such items, [28]products and/or services, or will immediately improve such services so that they meet the standards of excellence maintained by GIBSONS (CX 1447B; Tr. 8068).

55. Respondents expect that expansion of Gibsons, Inc. will be primarily through expansion of the licensing operations. Its subsidiary, Gibson Distributors, Inc., is expected to play an important role in such expansion. The 1976 annual report of Gibsons, Inc. states:[10]

> *Expansion of Gibsons Inc. is to be primarily through expansion of the licensed stores. To this end, Gibson has established a subsidiary—Gibsons Distributors Inc.* This is an experimental distribution center *designed to provide dual services as a profit control center and as a source of inventory for Gibson Discount Stores.* Over the next ten years the company anticipates at least eight such regional centers through which the licensed operations can be extended. Although the first center is a wholly owned subsidiary, *the expanded regional centers are proposed to be co-operatives to afford the greatest benefit to the licensed stores. Profits from such expansion for Gibsons Inc. should be reflected in increases in license fees and additional charges for management services* (emphasis added) (JR 20 p. 3). [29]

56. Respondents, in licensing others to use the Gibson trade names, have a vital interest in the profitability of the licensees or franchisees on whom licensing fees depend (Findings 47, 49, 55).

F. The Trade Show

(1) In General

57. The Gibson Trade Show came into existence about 1964 to 1965 (Rogers 7358; Bradsby 6794; Thomas 6584–85). It is held approximately four times a year (CX 1040A–C, 1041A–D; Leverett 3733).

58. In May 1967, H.R. Gibson, Sr., doing business as the "Gibson Products Company" Seagoville, Texas, leased the premises at Market Hall, Dallas, Texas four times per year, in the period 1967 through 1973, pursuant to the following schedule:

1968 - February 10–14
May 20–24
August 12–16
* November 4–8

1969 - February 8–12
May 12–16
August 18–22
* November 3–7

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[10] This document is inconsistent with the testimony of Gibsons, Inc.'s president, viz.:

> JUDGE von BRAND: Well, let me ask you this: Do you have anything to offer [to franchisees] in addition to the [Gibson] name?
>
> THE WITNESS: No, sir, none whatsoever. We've never got involved, we didn't want to get in with the management and the people and things like that to try to help them like McDonald's. We're not that type of organization. We don't charge for it (H.R. Gibson, Jr. 5695).

1970 – February 9–13
May 4–8
August 17–21
* November 2–6

1971 – February 8–12
May 10–14
August 16–20
* November 1–5

1972 – February 12–16
May 15–19
August 14–18
November 6–10

1973 – February 10–14
May 14–18
August 13–17
November 5–9 (CX 1040C).

The lease stated that the leased premises should be used for the sole purpose of: [30]

> Holding the Gibson Products private trade show, business meetings, and certain food functions (CX 1040A).

On November 30, 1972, H.R. Gibson, Sr., doing business as The Gibson Trade Show, contracted to rent the premises at Market Hall for the purpose of holding four shows a year in the period 1974 to 1979 (CX 1041A). Gibson, Sr. agreed that the premises were to be used for the sole purpose of "Holding a private trade show" (CX 1041A).

Market Hall in Dallas, Texas, where the Gibson Trade Show is held, is a 212,000 square foot exhibit fully designed for the display of merchandise (Cooper 4636).

59. The show was a closed show; it was necessary to have badges showing the name of the individual and company before gaining admittance (Moland 3596; CX 42, 43).

60. Gibson, Sr. and his employees invited the Gibson retailers to the Gibson Trade Show with letters announcing the date of the shows (Gibson, Sr. 5485).

61. In the period 1969 to 1972, only Gibson franchised or company owned stores attended the Gibson Trade Show (Munden Dep. CX 1435 pp. 24–25; Moland 3595). The jewelry buyer of the trade show recalled

that no one other than Gibson stores attended the show in 1972, 1973 and 1974 (Leverett 3796–97).[11]

62. Form letters used by the Gibson Trade Show in 1972 requested "All Manufacturers" to state their total dollar volume in the preceding year with all the Gibson stores (CX 307).

63. The Customer Information List 1975 Edition published by Gibson, Sr. is "A Comprehensive List of All Customers of the Gibson Trade Show" (CX 1330). The great majority of the stores listed therein were under the Gibson name. The Gibson Trade Show, as late as 1975, continued to be oriented to the Gibson stores.

64. The Gibson Trade Show affords participating manufacturers the opportunity to set up booths, to display their goods and to attempt to sell or place orders for their products with personnel of the Gibson stores attending the show (Moland 3595). Usually, retailer contacts with suppliers at the Gibson Trade Show are followed up at a later date (Gerald Gibson 5117). [31]

65. The booths at the Gibson Trade Show were staffed by employees of the suppliers or by manufacturers' representatives of the suppliers (Regeon 6687).

66. H.R. Gibson, Sr., in operating the trade show, published a Buyers Guide or Show Directory. This directory was distributed to manufacturers and retailers attending the show. It listed the names of manufacturers appearing at the show and the location of their booths (CX 42; Leverett 3904).

67. The amount of business generated by the Gibson Trade Show is substantial. The February 1974 show, for example, did a $200 million business (Gibson, Sr. 5519–23). The Gibson Trade Show operated at a profit in 1973, 1974 and 1975 (Gibson, Sr. 5343–B).

68. If a supplier or his representative got a product into the Gibson Trade Show, this meant that he had authorization to sell to the Gibson retailers attending the show. This did not guarantee, however, that a Gibson franchisee would buy such merchandise (Moland 3650).

69. Manufacturers and their suppliers considered it an advantage to meet Gibson retail buyers at the show. Many of these retailers were in locations hard to reach, and it is difficult to call on all of them individually to make a sales presentation (Moland 3650–51).

70. Gibson, Sr. retained money derived from the Gibson Trade Show which he did not pass on to retailers operating under the Gibson name (Gibson, Sr. 5090; Munden Deposition 44–45; Thomas 6591; H. Underwood 7083; Skelly 7956).

71. Trade shows generally, including the Gibson Trade Show,

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[11] In 1970 to 1971, this witness could only recall the owner of Wal-Mart stores attending as the guest of Gibson, Sr. (Leverett 3795–96).

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benefit attending retailers because the merchandise is laid out and it may be easier to shop than trying to look at catalogs or talk to sales personnel (Thomas 6588–89). [32]

72. In addition to providing facilities where the Gibson stores could select and purchase merchandise, the Gibson Trade Show also afforded them an opportunity to conduct meetings at the show. For example, the Buyers Guide for the Gibson Trade Show held November 5 through November 9, 1973, gave notice of the following meetings:

FRANCHISE OWNERS MEETING

SUBJECT: GENERAL INSURANCE

MONDAY, NOVEMBER 5 - 2:30 P.M.

UPSTAIRS AT MARKET HALL

* * *

FRANCHISE OWNERS MEETING

SUBJECT: TRAINING FILM

TUESDAY, NOVEMBER 6 - 2:00 P. M.

UPSTAIRS AT MARKET HALL

* * *

GDCI MANAGERS MEETING
ON
"INVENTORY PROCEDURES"

TUESDAY, NOVEMBER 6 - 7:30 P.M.

SEVILLE ROOM

QUALITY INN - 2015 NO. INDUSTRIAL

(CX 42. See also CX 43, a Buyer's Guide for the December 1975 Trade Show listing a meeting of the Gibson Franchise Association). [33]

73. The Gibson Trade Show has not helped retailers to promote

merchandise at the retail level. Nor have retailers learned to promote the resale of products at the Gibson Trade Show (Thomas 6590–91; Gerald Gibson 5117). There is insufficient time to discuss such promotion at the shows (Leverett 3886Q; Gerald Gibson 5117). Generally, there is more time to discuss such subjects when a sales call is made on a buyer in the buyer's office (Leverett 3886Q).

(2) Functions of Trade Show Buyers or Merchandise Managers

74. H.R. Gibson, Sr., in the period 1969 to 1975, employed buyers in his trade show organization (CX 41, 1327, 1328, 104).[12] These individuals were key employees in the operation of the Gibson Trade Show (See Findings 39, 78, 81, 84). The trade show buyers received instructions as to the functions which they were to perform from Gibson, Sr. (Leverett 3731). [34]

75. Manufacturers or their representatives contacted trade show buyers to have their products listed as authorized sources of supply for the Gibson Discount Centers as well as to obtain approval of such lines for the Gibson Trade Show (Moland 3541–43).

76. Individual Gibson Trade Show buyers were responsible for specific lines of merchandise such as soft goods, sporting goods, health and beauty products, toys, jewelry, stationery, school supplies, luggage, housewares, automotive supplies, hardware, etc. (CX 1327; Leverett 3708–09).

77. Trade show buyers, in contacting suppliers, referred to the "Gibson chain stores" in 1972, numbering "approximately 575 stores" (CX 307).

78. In most cases, it was the buyer's decision whether to put suppliers into the Gibson Trade Show. Sometimes, however, the decision was made by Gibson, Sr. (Leverett 3713). It was the trade show buyer's duty to examine the various product lines, to evaluate the lines and to discuss prices and products with suppliers or their representatives (Leverett 3712–13).

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[12] Respondents, in the course of this proceeding, referred to these employees as "merchandise managers." The titles, buyer and merchandise manager, may on occasion be used synonymously in this decision. However, in view of contemporaneous documents such as CX 41, 1327, 1328 and 104 in the period 1969 to 1972, the title, "buyer," is the one which will be used most frequently. Moreover, one of respondents' "buyers" or "merchandise managers" conceded that others had referred to him as a buyer. And, significantly, this witness admitted that these employees in their correspondence referred to themselves as "buyers" in the period 1969 to 1972 (Regeon 6661–62. See also Munden Deposition CX 1435 p. 20). Consider also the spontaneous exclamation of Gary Leverett, "Well, I assumed other buyer's duties — or, excuse — not a buyer but a merchandise manager in the trade show" (Tr. 3785). This again throws some doubt on denials that buyer is the appropriate title, particularly when such denials are inconsistent with the contemporaneous documents. See also the testimony of Barney Bradsby, one of respondents' franchisee witnesses:

Q. Do you know what company they [Perkins and Regeon] worked for?
A. They were merchandise managers for Mr. Gibson.
Q. Is that the title that they held, merchandise manager?
A. I don't know what their titles were. I would say they were something, buyers or something (Tr. 6808).

79. Manufacturers' representatives did not try to sell the trade show buyers actual orders but tried to persuade them to have the lines listed (Moland 3548). Buyers (or merchandise managers) of the Gibson Trade Show could not put their name on an order and place merchandise in any Gibson store (Leverett 3873).

80. When suppliers contacted Gibson Trade Show buyers, normally they would want to exhibit their entire line of products (Leverett 3760). Suppliers, however, were not permitted to exhibit their entire line of merchandise at the Gibson Trade Show; "deadwood" in the line was culled out after discussion between the trade show buyer and the supplier's representative (Leverett 3760).

81. The trade show buyers were interested in the price of products because they were evaluating many lines and, in some cases, certain suppliers offered basically the same items (Leverett 3716).

Buyers for the trade show negotiated with suppliers on billing terms and prices (Leverett 3718, 3747–48). Buyers negotiated better terms and prices than originally offered; [35]this was part of their duties (Leverett 3719; Moland 3552, 3560).[13] Gibson, Sr. and Belva Gibson, on occasion, also sought to negotiate lower prices from manufacturers (Moland 3563, 3602, 3605).[14]

If buyers, in their dealings with suppliers, had a question about price, they would call Gibson, Sr. and get his feelings on it (Leverett 3720). Gibson, Sr. expressed his views as follows:

> If a manufacturer presented us this item and he wanted $3 and we knew—would look at it and we knew it could be had for $2, we would say to Mr. Manufacturer, "Your price is all wet," or something of that nature, that "You're too high on that item. You ought to check on what your competitor is selling that for. We cannot do you a job, Mr. Manufacturer, we cannot sell this item at $3" (Gibson, Sr. 5364).

[36]Such negotiations to assure them a competitive price benefited the Gibson stores participating in the trade show.[15]

82. Respondent Belva Gibson, in the period 1969 to the end of 1970,

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[13] Q. Did you ever get better terms than a supplier initially offered you, as a result of these negotiations?
A. Than what I just discussed? Yes, sir. In some cases, I did.
Q. Was that one of your duties?
A. Yes, sir. I felt like it was.
Q. Did you ever negotiate better prices than those initially offered to you by a supplier?
A. Yes, sir.
Q. Was that one of your duties, also?
A. Yes, sir (Leverett 3719).

[14] Gibson, Sr., in the course of discussions with manufacturers' representatives, has asked, "Well, we know that is the price for the corner drug store; now what is our price [viz., the price of stores operating under the Gibson name]" (Moland 3563).

[15] Q. Did you regard this as a benefit to the stores to be able to buy these products at the prices like, for example, the $2 price that you mentioned in your testimony just now?
A. If we bought that for $3, it would certainly be a bad deal for anybody that bought it. But if he bought it at $2, and that was the price that all the competitive manufacturers was selling for, well, it would certainly be a benefit to him. He wouldn't get—what is generally said in the trade, he wouldn't get stuck on it (Gibson, Sr. 5364).

assisted trade show personnel in their duties of persuading retailers to visit booths at the show and helping trade show buyers in selecting jewelry and doll items for the show (Leverett 3866–67).

83. During an interval in the period 1969 to 1972, Gerald Gibson advised his father with respect to cameras and electronic equipment, when the latter had no merchandise manager in that area. In this connection, Gerald Gibson advised Gibson, Sr. as to whether the equipment might be good or bad (Gerald Gibson 4886, 4888). He dealt with approximately 50 manufacturers (Gerald Gibson 4916). The manufacturers approached Gerald Gibson; he passed on information and show sheets prepared by them to his father (Gerald Gibson 4889, 4900). Before transmitting such show sheets to his father, Gerald Gibson discussed with some of the suppliers the listings on the show sheets. Such discussions included multiple packaging programs and delivery terms, as well as the suitability of some of the items listed (Gerald Gibson 4900–01). Gerald Gibson reported to his father, who had the final decision on such matters (Gerald Gibson 4913). Although Gerald Gibson was not paid for these services and did not consider himself a merchandise manager (Gerald Gibson 5105), the foregoing activities involved certain of the functions for which merchandise managers were responsible. [37]

84. Buyers sent out letters to family-owned and franchised stores concerning price and product recommendations (Leverett 3727). Such mailings were made to all of the stores (Leverett 3725). And, sometimes a trade show buyer might make phone calls if he "had a red hot price for the trade show" (Leverett 3723). Trade show buyers sent such letters "[t]o attract Gibson people into the trade show" (Leverett 3731).

Franchised stores also received letters from trade show buyers listing items or manufacturers' lines which were not to be purchased (CX 1435 pp. 17, 18, 20 Munden Deposition).

Trade show employees have written to Gibson stores suggesting that certain suppliers be discontinued because the buyers no longer authorized or recommended the line since such suppliers would not sell at a price which the buyers would recommend as profitable for the stores' operation (see, *e.g.*, CX 104).[16]

Documents such as CX 104 on their face constitute merchandising advice by trade show buyers to the Gibson stores (*cf.* Finding 51).

85. At the trade show itself, it was the function of the trade show buyers to patrol the aisles and booths, talking to manufacturers and the other people attending. In the course of their duties, the trade show

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[16] Bobby Rogeon, one of the "Seagoville Buyers" whose signature appears on the document, admitted his signature at Tr. 6638.

buyers would bring buyers from retail stores attending the show to the booths of particular suppliers (Leverett 3834–35). The trade show buyers also visited the Gibson stores (Leverett 3839).

86. At the Gibson Trade Show, the trade show buyers were responsible for suppliers with lines of merchandise competing with each other (Regeon 6684–85; Leverett 3739, 3742–43, 3835–36; Gibson, Sr. 5357; Gerald Gibson 4953–54).

87. The Gibson Trade Show buyers were responsible for numerous booths at the trade show (Leverett 3735–37). They might be responsible for well over one hundred booths at such shows (Leverett 3736–37, 3762–63; Regeon 6682). It was a physical impossibility for the trade show buyers to see all the retailers at the show (Regeon 6687). A trade show buyer's average length of stay in one of the display booths "might not be but five minutes, just long enough to take the customer [retailer] in, introduce him to the factory, let the factory go to work on him, and I'd go get another customer for somebody else" (Regeon 6687–88). [38]

Essentially, manufacturers had to rely on their own personnel to make sales at the Gibson Trade Show.[17] [39]

88. The duties of such trade show buyers remained the same in the period 1969 to 1975 (Leverett 3724; Gibson, Sr. 5231).

(3) Blanket Orders

89. A blanket order was an order placed by "the Seagoville Office," namely, H.R. Gibson, Sr. or his buyers, for all stores. The stores were classed as A, B and C stores, and the quantity of goods to be purchased depended on the size of the store (Munden Dep. CX 1435 pp. 25–26;[18] Leverett 3842). A blanket order could be increased, decreased or cancelled by the individual stores (Leverett 3842). They are orders

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[17] Trade show employees made little or no effort to sell to Pamida, the largest franchisee group:

Q. Mr. Underwood, when you were attending the trade show, who would your buyers go to see to buy merchandise?

A. The manufacturer.

Q. And was the manufacturer always present, or did he have a representative?

A. Oh, he may have had a representative. I went to that manufacturer's booth, picked up the show sheets, discussed it with whomever was representing that manufacturer at that booth.

Q. Did you ever discuss goods which you were interested in with trade show personnel?

A. Not to my knowledge.

Q. Did they ever attempt to sell you those goods?

A. Not to my knowledge.

Q. Do you recall whether or not Mr. Gibson, Sr., has ever visited the Pamida offices to sell merchandise?

A. To my knowledge he never has.

Q. Have his employees attempted to sell merchandise at the Pamida headquarters?

A. To my knowledge they never have.

Q. Have you received phone calls from employees or from Mr. Gibson asking you to purchase a certain line of merchandise?

A. No, sir (Underwood 7109–10. See also McCrea 6620–21).

[18] Munden did not order merchandise under blanket orders in 1969 to 1970 (CX 1435 p. 47).

recommended by the trade show buyers to the Gibson retail stores (Leverett 3844; Regeon 6619).[19] In most cases, the Gibson store receiving a blanket order in the years 1969 to 1975 had to respond thereto in order to cancel or modify such orders during that period (O'Kelley 6422).

In that period 1973 to 1974, blanket orders went to all stores operating under the Gibson name, including those stores in which H.R. Gibson, Jr. and Gerald Gibson had a financial interest (Leverett 3848–50).

Subsequent to the negotiation of a Bunte Candy blanket order, a manufacturer's representative doing business with the Gibson Trade Show received a plaque and membership in the "One Million Dollar Club." Inscribed on the plaque were the names of the following officers of Gibson Discount Centers: H.R. Gibson, Sr., Chairman of the Board, Belva Gibson, Secretary-Treasurer and H.R. Gibson, Jr., President (Moland 3683–84, 3689–90). [40]

(4) Show Sheets

90. Show sheets were essentially abbreviated price lists that manufacturers used to sell merchandise at the Gibson Trade Show (Gerald Gibson 4902). They were also used as order forms by retailers (Leverett 3758; Gibson, Sr. 5584).

Show sheets contained the prices and terms negotiated between trade show buyers and suppliers and approved by the former (Leverett 3754–55). For example, show sheets showed the freight terms under which the products were to be shipped (Leverett 3747).[20] And, the "show price" and the duration of such price were also noted on these forms (Leverett 3748–49).[21]

91. One of the preprinted headings on the show sheets was the term, "Ship to," and, underneath that heading, the name, "Gibson Products Company" (CX 196A; Leverett 3756). Underneath "Gibson Products Company" were blank lines for filling in the address of the particular store (Leverett 3757). This heading referred to the retailer customer in the Gibson Trade Show (Leverett 3757). No show sheets were printed with a name other than "Gibson Products Company" under the "Ship to" column (Leverett 3758).

92. After manufacturers had sent in a prepared show sheet and the trade show buyer had approved the prices and terms that had been

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[19] For example, on a $2 million blanket order for candy from the Bunte Candy Company, the shipments were $800,000 (McLain 6773).

[20] Factors indicating that retailers were getting "a real extra special buy in the Gibson Trade Show" were noted in the remarks column (Leverett 3747; CX 196A).

[21] If there were an "extra special price for the trade show" which ran only for the duration of the trade show, then the buyer had to commit himself during the show to get the "special prices and terms" (Leverett 3749).

filled in, respondents printed the forms for use in conjunction with the trade show (Leverett 3754).

Once the show sheets had been printed,[22] they were taken to the Gibson Trade Show and handed out to the manufacturers and manufacturers' representatives (Leverett 3758). Retailers attending the Gibson Trade Show generally picked the show sheets up at the show (Gerald Gibson 4902). [41]

93. Show sheets contained the following notation:

> Notice!!! Do not ship at prices higher than listed hereon or we will deduct. Price approval contact the Seagoville, Texas offices (Gibson, Sr. 5504; CX 854B).

The purpose of this notice was to notify Seagoville of any price increases. The language, "Do not ship at prices higher than listed hereon or we will deduct. *Price approval contact the Seagoville, Texas offices*" (emphasis added), is consistent with the Gibson Trade Show's role as an agent or representative of Gibson retailers and inconsistent with the claim that the trade show is a manufacturer's representative.

94. Show sheets were an integral part of the Gibson Trade Show's operations (Findings 90–93).

(5) Booth Fees

95. Booth fees are the amount of money that the manufacturers pay for renting space to display their merchandise at the Gibson Trade Show (Gibson, Sr. 5146–47; Gerald Gibson 4897). The booth fee is a set amount, and is the same for all trade show participants (Gibson, Sr. 5236).

96. In the period 1969 to November 1, 1972, Ideal Travel Agency received booth fees for rental of space at the Gibson Trade Show (Gibson, Sr. 5582). In that period, Ideal had its own bank account and paid no monies to corporations operating retail stores (Gibson, Sr. 5582).

(6) Show Fees

97. Suppliers seeking to participate in the Gibson Trade Show were asked for a show fee by the trade show buyers in the period 1969 to 1975 (Leverett 3785). Suppliers who refused to pay a show fee were not permitted to participate in the Gibson Trade Show (Leverett 3792, 3812). Suppliers were willing to pay the show fee because the Gibson Trade Show generated a lot of sales (Leverett 3834).

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[22] Show sheets were printed in the respondents' print shop in Seagoville, Texas, under Lloyd Reese, as shown in CX 41 (Leverett 3758–59, 3779). The print shop was just around the corner from the buyers' offices in Seagoville (Leverett 3759).

98. The show fee was based on a percentage of sales made at the Gibson Trade Show to persons attending the show, namely, Gibson stores (Leverett 3791). And, the amount of the show fee was negotiable (Leverett 3790). The show fee, moreover, was to be paid on those sales made outside the Gibson Trade Show as well as those made at the show (Regeon 6689). [42]

Not all suppliers, however, paid a percentage of their sales as the show fee. Some, like Empire Pencil, paid a flat fee of $15,000 in 1975 (Low 7719-20; CX 1255).

Show fee payments were payable on a quarterly, semi-annual or annual basis (Leverett 3791). The timing of the show fee payments was also negotiable (Leverett 3791-92).

There were no rules on setting show fees on the basis of whether the product was easier or more difficult to sell (Leverett 3886F-G). Setting the show fee with a particular supplier or manufacturer depended on the individual situation of that supplier (Leverett 3886H-I).

99. H.R. Gibson, Sr. instructed trade show buyers that one of their duties was to ask for the show fee (Leverett 3786). Occasionally, trade show buyers would report their show fee negotiations with suppliers to H.R. Gibson, Sr. (Leverett 3809).

Gibson, Sr. gave trade show buyers instructions concerning percentages to be asked in connection with show fees (Leverett 3800). Gibson, Sr. would issue instructions, such as, "Gary, talk to them and see what they can pay us" (Leverett 3802). In the majority of instances, Gibson, Sr. gave no specific instructions as to the percentage that was to be asked (Leverett 3802).

100. Prior to November 1, 1972, agreements concerning show fees were verbal. Subsequent thereto they were the subject of written agreement (Low 7461-62).

101. When Gibson, Sr. received the trade show fees in the period 1969 to November 1, 1972, they were deposited in his personal account and not put into the account of any corporation operating a retail store under the Gibson name (Gibson, Sr. 5581).

102. The Gibson Trade Show buyers (or merchandise managers) received a weekly salary and a small percentage of the show fee ranging from three to five percent (Gibson, Sr. 5238, 5242-43).

103. The show fee payment had nothing to do with suppliers' payment of booth fees for the rental of display space in the Gibson Trade Show (Leverett 3787).

104. The purpose of the show fee based on the percentage of a supplier's sales was to make money for the Gibson Trade Show (Leverett 3808). [43]

(7) Tabloids

105. A tabloid is an advertising section, usually about half the size of a normal newspaper page, about eight to 16 pages in size folded over and inserted in a newspaper or mailed out (Gerald Gibson 4849; Leverett 3823).

106. H.R. Gibson, Sr., in 1969 and 1970, in connection with the trade show, offered suppliers the opportunity to participate in Gibson tabloids (CX 1420A–B).[23] [44]

107. G&G Advertising, operated by Gerald Gibson as a proprietorship, prepared tabloids advertising products in the Gibson stores in the period 1969 to 1973 (Gerald Gibson 4849). Gerald Gibson put together the tabloid and, then, mailed a mock-up to the stores. The stores, if they so desired, could purchase the tabloid, buying as many pieces as they wanted for their market (Gerald Gibson 4851–53). Those stores buying a tabloid had their names placed on it (Gerald Gibson 4849–50). Sometimes, the tabloids were placed in the windows of the stores purchasing them (Gerald Gibson 4853).

108. Stores purchasing such tabloids did not pay Gerald Gibson's G&G Advertising for the privilege of being listed therein (Gerald Gibson 4851). The tabloids, prepared by G&G, were displayed by a printer, News Inc., at the Gibson Trade Show along with tabloids for other retailers. News Inc. was in the business of selling its publishing services in connection with such tabloids to retailers at the trade show (Gerald Gibson 4853).

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[23] Q. *Mr. Gibson, in 1969 in connection with the Trade Show did you offer to serve suppliers the opportunity to advertise in the tabloid?*

A. *Yes, sir.*

Q. Mr. Gibson, did you inquire from these suppliers as to whether or not they had any standard advertising program?

A. I personally didn't. Den Woody who published the tabloid they had a booth in a show and the various exhibitors that wanted to advertise in a tabloid would contact Den Woody for an ad of half a page, quarter a page, or a whole page, or whatever they wanted.

And most all cases they paid Den Woody direct for the ad.

Q. All right, sir.

Mr. Gibson, did you, in conducting the Gibson Trade Show in the year 1970 conduct a tabloid advertising program?

A. Did I conduct one?

Q. Let me rephrase the question, sir.

Did you, Mr. Gibson, in 1970 in your capacity as the individual sponsoring the Gibson Trade Show offer to the suppliers a tabloid program?

A. *We had tabloids from time to time; yes, sir.*

Q. And, Mr. Gibson, did you have a tabloid program in 1971?

A. I do not recall any at the moment.

Q. All right, sir (emphasis added) (CX 1420A–B).

Gibson, Sr.'s testimony at the evidentiary hearings is inconsistent with his prior deposition testimony in CX 1420A–B. At the hearings, he testified:

A. The trade show never had any tabloid. This is not anything that belongs to the Gibson Trade Show.

Q. Thank you, Mr. Gibson (Gibson, Sr. 5822).

109. Suppliers contacting Gibson Trade Show buyers generally wanted to participate in the tabloid (Leverett 3823). They approached trade show buyers in order to get their products advertised in the tabloid, viz., the so-called "tab items." [45]The trade show buyers presented such tab items to H.R. Gibson, Jr., Gerald Gibson or Bill Rea,[24] who had discretion whether to put an item in the tabloid or not (Leverett 3863).

110. If a tab item was put in the tabloid, there was a sign at the booth in the Gibson Trade Show stating, "Recommended tab item." This procedure was in effect in the period 1969 to 1975 (Leverett 3863; Moland 3595). Trade show buyers, in discussing tab items with suppliers, wanted to make sure there was a competitive price on such items (Leverett 3865).

111. Suppliers did not pay for advertisements in the tabloids with trade show fees such as booth fees or show fees (Renninger 461; Gerald Gibson 5102). However, such payments were requested on the invoices of respondents such as Gibson Discount Centers, Inc. and paid to respondents such as Gibsons, Inc. (CX 491A, 491D).

112. Trade show buyers have signed "Gibson Tabloid" authorization forms under the heading, "Approved and Accepted (Gibson Products Co.)" (CX 491E; Leverett 3823–30; CX 1158D; Regeon 6675–76; CX 1326B; Perkins; CX 377B; Low 7642).[25] The name, "Gibson Products Company," on such authorization forms refers to the trade name used by H.R. Gibson, Sr. (Regeon 6676). This is also the trade name used by Gibson, Sr. in his trade show operation (see, *e.g.*, CX 1040A–C Trade Show Lease signed by Gibson, Sr. for the period 1967 to 1973). [46]

113. On November 2, 1968, H.R. Gibson, Sr. sent a letter "To: ALL GIBSON SUPPLIERS" requesting their participation in a tabloid supplement in the *Dallas Morning News*. This tabloid was to run on March 2, 1969, and was to be entitled, "March Whirlwind of Savings" (CX 125). In pertinent part, this solicitation stated:

> With such fantastic sales results in mind, I feel sure you will want to participate in the March "Whirlwind of Savings" with an appropriate ad in the March 2 tabloid which The Dallas Morning News will again publish exclusively. I firmly endorse it!
>
> Please sign the attached space order and return to me, or take it to The Dallas Morning News representatives in Booth 3 at the show (CX 125).

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[24] Bill Rea, in February 1975, when Leverett left the Gibson Trade Show, was working under Herbert Gibson, Jr. and Gerald Gibson for the Gibson stores (Leverett 3870).

[25] The explanation that the trade show and the trade show buyers had nothing to do with the tabloid is not convincing. One of the "Gibson Tabloid" authorization forms in the record indicates copies thereof are to go to "Bill Ben Ledbetter" and to "Seago Buyer" (CX 491E). Trade show buyers have signed their correspondence as "Seagoville Buyers" (See CX 104; Regeon 6680). In the case of CX 377B, 1158D and 1326B, the signatures of Messrs. Low, Perkins and Regeon appear over the title, "Buyer" (Compare with CX 1327). The forms on their face evidence such a relationship.

114. On February 21, 1969, H.R. Gibson, Sr. wrote a letter to "NAME BRAND GIBSON SUPPLIERS" requesting participation in cooperative advertising to be published in a "NAME BRAND" tabloid by the *Dallas Times Herald* on May 4, 1969. The letter stated, in pertinent part:

> Work carefully with our buyers in the selection of items, to make certain this is an outstanding sales event, as well as an important public relations milestone.
>
> Please give this your immediate attention and work with the Dallas Times Herald representative, who will be contacting you during the February Show. . .
>
> I personally appreciate your cooperation and look forward to a truly important promotion for Gibson Discount Centers and you (CX 75).

115. On February 24, 1969, H.R. Gibson, Sr. sent a letter "TO: ALL GIBSON SUPPLIERS" requesting that they participate in promotional advertising to be published in the June 1, 1969, *Dallas Morning News*. This advertising supplement was to be sponsored by 30 Gibson Discount Centers, including nine stores in Dallas County (CX 74A, D). [47]

116. H.R. Gibson, Sr., in the period 1969 to 1972, at the same time that he was soliciting fees for participation in the Gibson Trade Show, solicited fees for cooperative advertising from "Gibson Suppliers" for the Gibson Discount Centers (Findings 106, 113-15).

117. Respondents' trade show operations and retail operations were interrelated in the solicitation and receipt of payments from suppliers participating in the trade show for tabloid or other advertising directed to the consumer (Findings 106, 107, 109, 110, 112-16). [48]

II. Evidence under Count I of the Complaint

A. L. M. Becker Co.

118. L. M. Becker Co. ("Becker"), of Appleton, Wisconsin, sells and ships vending machines and refills for vending machines throughout the United States (Hare 2527). Such sales include shipments to Gibson stores located outside of Wisconsin (CX 599A-Z-22). Becker is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

119. The vending machines involved in these transactions were manufactured by Becker; the refills were manufactured by other companies (Hare 2527, 2530).

120. From 1969 to 1973, Becker's sales organization consisted of 30 to 35 sales brokers who were employed on a commission basis and helped sell Becker products to retailers (Hare 2528, 2720-21).

Becker employed a broker who served as a manufacturer's representative in the Dallas-Fort Worth area and attended the Gibson Trade Show as Becker's sales representative (Hare 2552). Neither H.R. Gibson, Sr., the Gibson Trade Show, the Gibson Products Company nor anyone associated with respondents was considered by Becker as its manufacturer's representative or food broker in the Gibson Trade Show during the 1969 to 1972 period (Hare 2553, 2740).

121. Becker participated in the Gibson Trade Show in order to be able to make sales to Gibson stores (Hare 2539, 2606). This supplier's sales volume to all Gibson retail stores during the years 1969, 1970 and 1971 was three to five percent of its total sales (Hare 2640).

122. Becker participated in the Gibson Trade Show in 1969, 1970 and 1971 (Hare 2537). It attended two Gibson shows in 1969 and 1970, and one in 1971 (Hare 2603).

123. The services provided by the Gibson Trade Show to Becker included maintaining contact with the Gibson retail stores, preparing and distributing show sheets, bringing retailers over to Becker's booth at the trade show and, generally, helping Becker sell to the Gibson retail stores (Hare 2681, 2683–86, 2720).

124. The requirements for Becker's participation in the Gibson Trade Show were: a ten percent rebate on all sales to Gibson family owned and franchise stores and payment for rental of booth space (Hare 2538–40, 2545–46, 2605). [49]

125. Becker furnished product and price information for show sheets that would be utilized at the Gibson Trade Show. Prior approval from the Gibson Trade Show was necessary before goods could be offered for sale at the show (CX 594, 597; Hare 2607–08). The show sheets served as purchase order forms for use by Gibson retail store buyers both at the trade show and later on (Hare 2684–85). [50]

126. Becker made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
May 12-16, 1969	1	$225.00	$225.00	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	CX 580A-F
[Date of payment - April 16, 1970]			$250.00	Check	Gibson Discount Center Toy Trade Show Market Hall - 2200 Stemmons Freeway Dallas, Texas	CX 592A-B

[51]127. When Becker contacted Gordon Fielden, a buyer for Gibson in Seagoville, about participating in the Gibson Trade Show,

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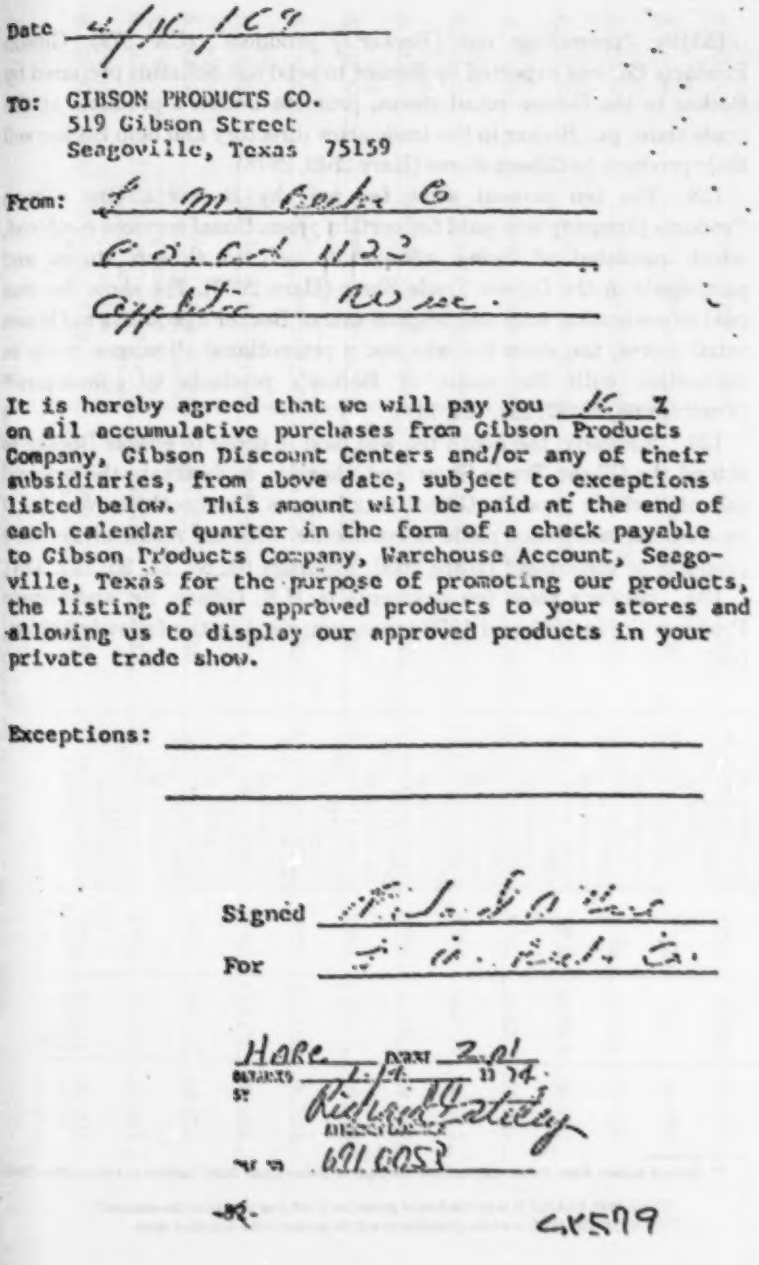
* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

Fielden said that this supplier would have to pay the ten percent rebate in order to be "authorized" or "listed" to be in the show and authorized to sell to Gibson stores (Hare 2539-40, 2545-46; CX 579). Becker believed that if it were not "authorized" or "listed," it would be unable to sell to any of the Gibson stores (Hare 2541, 2543-44).

Becker agreed to make the ten percent rebate and signed a document so stating: [52]



Date 4/16/69

To: GIBSON PRODUCTS CO.
519 Gibson Street
Seagoville, Texas 75159

From: F. M. Becker Co.
P.O. Box 1123
Appleton Wisc.

It is hereby agreed that we will pay you 16 %
on all accumulative purchases from Gibson Products Company, Gibson Discount Centers and/or any of their subsidiaries, from above date, subject to exceptions listed below. This amount will be paid at the end of each calendar quarter in the form of a check payable to Gibson Products Company, Warehouse Account, Seagoville, Texas for the purpose of promoting our products, the listing of our approved products to your stores and allowing us to display our approved products in your private trade show.

Exceptions: ______________________

____

Signed [illegible]

For F. M. Becker Co.

Hare 201
1/14 74
Richard
691 0053

GX579

[53]By "promoting our [Becker's] products" (CX 579), Gibson Products Co. was expected by Becker to send out bulletins prepared by Becker to the Gibson retail stores, promote Becker's products at the trade show, put Becker in the trade show directory and help Becker sell their products to Gibson stores (Hare 2549, 2678).

128. The ten percent show fee paid by Becker to the Gibson Products Company was paid for certain promotional services rendered, which consisted of being allowed to sell to Gibson stores and participate in the Gibson Trade Show (Hare 2650). The show fee was paid in connection with the original sale of Becker's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Becker's products to consumers[26] (Findings 68, 73, 97, 121, 124, 127).

129. Similarly, the booth fee was paid in order to enable Becker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Becker's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Becker's products to consumers (Hare 2650; Findings 64, 68, 73, 95, 121, 124).

130. Becker's show fee payments to H.R. Gibson, Sr. and Gibson Products Co. in 1969 and 1970 are summarized in the following chart: [54]

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[26] Richard Andrew Hare, former national sales manager of Becker (Hare 2526), testified as follows (Hare 2650):

> JUDGE VON BRAND: It is not the kind of promotion to sell your product to the consumer?
> THE WITNESS: No. It is a total promotion to sell the product to the individual store.

Becker made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Becker Records	
$145.50	7/23/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	June 1969	Rebate for month ending June 30, 1969 on shipments for which payment has been received	CX 579, 58 582A-C
$364.00	8/20/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	July 1969	Rebate for month ending July 31, 1969 on shipments for which payment has been received	CX 579, 5 583A, C-D
$318.45	9/23/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	August 1969	Rebate report - August	CX 579, 5 584A-C
$529.30	10/16/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	September 1969	Rebate report - September	CX 579, 58 585A-C
$332.50	11/18/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	October 1969	Rebate report - October	CX 579, 58 586A-C
$452.80	12/12/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	November 1969	Rebate report - November	CX 579, 58 587A-C
$148.80	1/22/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	December 1969	Rebate report - December	CX 579, 58 588A-C
$ 95.00	2/24/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	January 1970	Rebate report - January	CX 579, 5 589A-C
$300.50	3/23/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	February 1970	Rebate report - February	CX 579, 5 590A-C
$153.00	4/16/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	March 1970	Rebate report - March	CX 579, 5 591A-C
$148.00	5/19/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	April 1970	Rebate report - April	CX 579, 5 593A-B
$420.05	7/8/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	May 1970	Gibson rebate - May	CX 579, 5 595A-D
$329.55	7/21/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	June 1970	Gibson rebate - June	CX 579, 5 596A-C

[55]131. During the 1969 to 1971 period, Becker neither made nor offered to make payments based upon a percentage of total sales or alternate payments, except for the bulletin payments,[27] to any of its customers, other than the Gibson Products Company, for promotional services rendered (Hare 2645, 2652–60).

During the 1969 to 1971 period, Becker did not make any payments based upon a percentage of total sales in connection with any of the trade shows that it attended, other than the Gibson Trade Show (Hare 2661).

During the 1969 to 1971 period, Becker neither made any payments similar to the show fee payments nor made or offered to make an alternate payment to the booth fee to those of its customers that did not hold trade shows (Becker 2662).

132. After Becker ceased participating in the Gibson Trade Show, its sales volume with Gibson retail stores dropped in 1973 and 1974, due in part to competition from another vending company (Hare 2642, 2644, 2718–19).

133. During the 1969 to 1971 period, Becker operated a promotional program wherein it would make payments to wholesalers for bulletins sent by the wholesaler to Becker's retail customers in order to encourage purchases by the retailer from the wholesaler (Hare 2645–46). This same type of bulletin was made available to the Gibson Products Company (Hare 2649). The ten percent show fee paid to the Gibson Trade Show was in addition to the bulletin program (Hare 2649). Other than this bulletin program, Becker had no promotional or advertising program available for its customers (Hare 2648).

134. Becker paid the expenses of its employees who attended the Gibson Trade Show (Hare 2609).

135. The refills sold by Becker were not the type of product that lend themselves to advertising to the general public. Becker was unconcerned with promoting its products to consumers (Hare 2675–77).

136. Becker's vending machines were sold only to retail stores and not to consumers (Hare 2673). Thus, the vending machines were not, and could not be, subject to promotional advertising in connection with their resale.

137. In 1969 and 1970, Becker produced six product lines which included the following machines: a one penny toy and gumball, a one penny toy and hard candy, a nickel toy and gumball, [56]a nickel capsule with toys in it, a dime capsule with toys in it and a quarter capsule with toys in it (Hare 2529, 2535; CX 594).

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[27] See Finding 133.

The refills, produced by other companies and purchased by Becker, were all standard lines of products that went out to every customer[28] (Hare 2530–31).

All of Becker's products cost Becker $5.00 per box and were retailed at $10.00 per box. Thus, a penny gumball box would have 1,000 gumballs, while a dime box would have 100 items in it (Hare 2532–33).

The nickel, dime and quarter capsules contained toys such as spiders, bugs, rings, et al. (Hare 2533).

138. The shelf life of the items that went into the capsules is indefinite. The shelf life of the items that went into the gum and candy is approximately one year (Hare 2533).

139. Some of Becker's invoices indicate that the company sold its merchandise to Affiliated Food Stores, Inc., a wholesaler who handled billing for Becker and warehoused merchandise for some of Becker's retail customers. However, individual retail stores were the indirect customers of Becker's products, at least in the majority of instances, when they were the direct recipients of shipments from Becker[29] (CX 599A–M, R, Y, Z–6, Z–9, Z–11–Z–22; Hare 2566–70, 2670–72, 2699–2703, 2707–08). Becker regarded as its customer the firm to which the shipments were noted on the invoice (Hare 2569–70).

140. The invoices in the record reveal several contemporaneous sales involving goods of like grade and quality sold to competing customers, including the following examples[30] (CX 587U, 589F, 599A, R, Y, Z–6, Z–9, Z–11–Z–15, Z–20, Z–22): [57]

Henderson, Texas: Toy N Joy Toy or Candy 1000/1¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins[31] - 6/2/70); Toy N Joy Toy or Gum 1000/1¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70); Toy N Joy Capsules 1000/10¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70); Toy N Joy Capsules 40/25¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70).

Dallas, Texas: Toy N Joy Toy or Candy 1000/1¢, Toy N Joy Toy or Gum 1000/1¢, Toy N Joy Capsules 200/5¢, Toy N Joy Toy and Gum 200/5¢, Toy N Joy Capsules 100/10¢, Toy N Joy Capsules 40/25¢ (Gibson - 10/7/69, 1/26/70, 3/16/70, 6/10/70, 8/10/70, 9/22/70; Sundown Food Store[31] - 8/31/70, 9/29/70, 10/26/70; M.E. Moses Company[31] - 11/30/70; D&J Supermarket[31] - 6/2/69). [58]

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[28] Thus, the same penny box of gum or nickel box of capsules went out to every Becker customer (Hare 2531).

[29] Certain of the invoices in the record indicate that shipments were made to Affiliated (CX 599N–Q, S–W, Z–Z–5, Z–7, Z–8), or made to entities whose functional level is unknown. In these instances, it is not possible to determine whether the goods sold were sold to a nonfavored customer of Becker's competing at the same functional level as the Gibson stores.

[30] Commission counsel introduced numerous invoices of sales by Becker to Gibson retail stores located across the country (CX 582D–Y, 583F–S, U–X, 584D–R, 585D–W, 586D–T, 587D–T, V–W, 588D–J, 589D–E, G–H, 590D–O). However, there is no record evidence of any sales by Becker to any competing stores in these cities.

[31] Luther Jenkins, Sundown Food Store, M.E. Moses Company and D&J Supermarket function at the retail level of operations (Finding 369).

B. The Parker Pen Company

141. The Parker Pen Company ("Parker"), of Janesville, Wisconsin, sells writing instruments, writing sets and desk sets (Renninger 264).

Its major manufacturing facility is in Janesville, and its products are sold and shipped from there throughout the United States (Renninger 264). Such sales include shipments to Gibson stores located outside of Wisconsin (CX 506A–F). Parker is engaged in interstate commerce and its transactions with the respondents, including the show fee payments based on such sales, are in the course of such commerce.

142. Parker ranks first in the worldwide sales of writing instruments and desk sets; domestically, it ranks third or fourth in such sales (Renninger 264–65).

143. Parker began selling to the Gibson Discount Centers in the early 1960's (Renninger 268). In the period 1971 to 1974, there were approximately 485 Gibson Discount Centers; Parker sold both of its product lines to approximately 210–220 of these stores during this period (Renninger 269, 274). It sold to both company owned and franchised stores (Renninger 272–73).

In the period 1971 to 1974, this supplier's sales to the Gibson retail stores constituted almost one percent of its total sales (Renninger 279). In 1971 to 1973, the Gibson stores as a group were considered Parker's largest account. In 1974, they were number one or number two (Renninger 281–82).

144. Parker shipped goods to the individual Gibson stores and billed the paying office indicated for the particular store (Renninger 270).

145. In the years 1971 to 1974, Parker attended or participated in at least one Gibson Trade Show per year (Renninger 283).

It participated in the Gibson Trade Show because, in its view:

> The key to doing business with Gibson at that time was to attend the shows, and prior to attending the show was to get your product authorized and listed on the show sheets. [59]
>
> The assumption on our part was that if you didn't go through that process, your likelihood of maintaining a rate of sale and volume to the Gibson stores would practically diminish to nothing (Renninger 318–19. See also Tr. 291).[32]

146. In the years 1971 through 1974, Parker did not employ H.R. Gibson, Sr. as a manufacturer's representative or broker to represent it at the Gibson Trade Show (Renninger 310–11); Parker considered H.R. Gibson, Sr. to be a customer in the period 1971 to 1974 (Renninger 335–36).

147. In the Gibson Trade Shows in which it participated in 1971,

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[32] In 1975, a year when Parker did not participate in the Gibson Trade Show, its sales to the Gibson stores were 50 percent of sales in the preceding year (Renninger 282).

1972, 1973 and 1974, Parker made no sales to retailers other than Gibson Discount Centers (Renninger 300, 309). All of Parker's sales at the Gibson Trade Show were made through the use of show sheets (Renninger 308). Furthermore, at the beginning of each show, the trade show staff gave Parker a list of stores in order to verify that someone from each of those stores visited Parker's booth. The check list only contained the names of Gibson stores (Renninger 300–01).

148. Manufacturers' products had to be presented to a Gibson Trade Show buyer, accepted for sale and listed on show sheets before any manufacturer could display and sell its products to the Gibson retail stores (Renninger 291). In the case of Parker, the trade show buyer in question was Gary Leverett, the stationery and jewelry buyer (Renninger 291, 311–12).

Show sheets listed the products to be displayed or sold to Gibson stores. They gave the product description and price, listed whether the product had a special promotional price and stated whether the product was going to be advertised in a Gibson tabloid (Renninger 294).[33]

Generally, Parker's customers picked up the show sheets at the trade show and, subsequently, sent in the show sheets to Parker's representative as completed purchase orders (Renninger 298). 25% of Parker's sales to the Gibson stores were during the selling periods shown on the show sheets. The majority, or 75%, of Parker's sales to these stores, however, were made by Parker's sales personnel calling on the stores and writing their orders (Renninger 298). [60]

149. During the 1971 to 1974 period, Parker's employees and representatives staffed the booths at the Gibson Trade Shows (Renninger 283–84, 289–90). And, Parker paid the expenses for its employees attending the Gibson Trade Show, including transportation, lodging and meals (Renninger 316).

150. Parker representatives demonstrated products and discussed selling techniques with Gibson retail store buyers and owners at the Gibson Trade Show (Renninger 289–90). The more product knowledge a buyer has, the better he can sell that product (Renninger 293–94). However, in making sales calls on other customers, Parker's sales force would also explain the advantages of their product, demonstrate the product and help to develop selling methods (Renninger 400–01).

151. During the 1971 to 1974 period, the requirements which Parker had to meet to participate in the Gibson Trade Show were: securing the trade show buyer's approval for merchandise that was to be included on the show sheets; payment for the rental of booth space;

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[33] CX 501A and CX 497 are show sheets (Renninger 294–96).

and, payment of a show fee based on a percentage of total sales to all Gibson stores (Renninger 311, 313–14, 317–18). [61]

152. Parker made the following booth fee payments pursuant to its participation in the Gibson Trade Show in the period 1971–1974:

	Show	Number of Booths	Amount of Payment	Form of Payment	Payee	
1971	February '71	2	$550	Check	Ideal Travel Agency	CX 466A-C
	May '71	1	$275	Check	Ideal Travel Agency	CX 470A-E
	August '71	1	$275	Check	Ideal Travel Agency	CX 473A-E
1972	May '72	1	$300	Check	Ideal Travel Agency	CX 478A-C
	August '72	1	$350	Check	Ideal Travel Agency	CX 482A-D
1973	May '73	1	$350	Check	H.R. Gibson, Sr.	CX 488A-E
	August '73	1	$350	Check	H.R. Gibson, Sr.	CX 492A-E
1974	February '74	1	$350	Check	H.R. Gibson, Sr.	CX 497A-E
	August '74	2	$700	Check	H.R. Gibson, Sr.	CX 500A-D

[62]153. The first request made to Parker for a show fee was in early 1971 (Renninger 322, 324). Initially, the supplier refused to pay the show fee (Renninger 324). Subsequently, in August 1971, the Gibson Trade Show buyer, Gary Leverett, told Parker's representative that it would have to pay the show fee (Renninger 324–25). When Parker's representative advised Leverett that he thought such payment would be illegal, Leverett stated it would have to be paid (Renninger 481–83). In this connection, Parker's representative had been informed that, unless the show fee were paid, its products would not be listed and it would not be permitted to participate in the show (Renninger 330).

Parker decided to make the show fee payments in order to participate in the Gibson Trade Show because, at this time, the Gibson stores were considered the largest discount chain that it had. The Gibson stores represented a sizable amount of business and Parker's officials did not feel that they could walk away from this kind of business (Renninger 318, 325–26).[34]

154. The amount of the show fee was to be based on five percent of total sales to all Gibson Discount Centers, including both company owned and franchised stores (Renninger 317–18, 326). Originally, Leverett had asked for three percent, but the request escalated to five percent by August 1971 (Renninger 326).

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[34] Parker felt that it could not afford to lose the Gibson business which amounted to about $100,000 at that time (Renninger 327).

155. Gibson requested that the show fee payment be made by check but Parker paid by credit memorandum (Renninger 328).[35]

156. Parker wanted an invoice for the show fee but never received one (Renninger 328–29). It wanted the invoice because its counsel felt the payment was illegal and part of the sales upon which the show fee was based were generated by franchised rather than Gibson owned stores (Renninger 329).

The five percent show fee to cover 1974 was paid in 1975 by a check sent to H.R. Gibson, Sr.'s attorney, Bardwell Odum (Renninger 333). Parker had previously advised Mr. Odum that, in its opinion, the fee was illegal. Mr. Odum claimed the fee was not illegal but due under a contract for invoices. Parker decided to pay, but never received any answer as to what services it was paying for in response to a request for that information (Renninger 333–35, 488. See also CX 505B, 505C, 1325; SR 55, 56A–B). [63]

157. Parker's show fee payments for the period 1971–1974 may be summarized as follows:

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[35] A credit memorandum is a negotiable instrument between a supplier and a customer where the customer may use the credit memorandum to offset part of his bill with the supplier (Renninger 331).

Amount	Date of Payment	Form of Payment	Payee	Period For Which Payment Was Made	Description of Payment on Parker Records
$5145.00	1972	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	4/1/71 through 12/31/71	Coop Advertising* X Mas
$ 515.34	5/9/72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	1st Quarter 1972	Spring 1972 Coop Advertising**
$1562.84	8/30/72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2nd Quarter 1972	Coop Advertising*** Spring
$2020.34	Nov. '72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3rd Quarter 1972	Coop Advertising****
$ 873.54	Jan. '73	Credit Memorandum	Gibsons Inc. 519 Gibson St. Seagoville, Texas	4th Quarter 1972	Coop Advertising***** X Mas
$6019.50	2/7/74	Credit Memorandum	Gibsons Inc. 519 Gibson St. Seagoville, Texas	1973	5% allowance******
$3502.05	4/14/75	Check	H.R. Gibson, Sr.	1974*******	

* CX 477A; Renninger 366-387, 394.

** CX 477C; Renninger 387-388.

*** CX 477E; Renninger 388.

**** CX 477G-H; Renninger 388.

***** CX 477I; Renninger 386.

****** CX 466A; Renninger 395.

******* CX 505-A; Renninger 389-91.

[64]158. Parker regarded the five percent show fee as a discount or price reduction (Renninger 465). Parker did not regard the fee as cooperative advertising payments[36] (Renninger 463–64). The payment was made to enable Parker to display its merchandise to the Gibson Discount Center retailers attending (Renninger 497K–L; SR 51).

159. The Gibson Trade Show is not a service in connection with the resale of Parker's products to consumers. Parker's reason for attending the show was to get its products listed and into the hands of the buyers of the Gibson retail stores; it was concerned with making the original sale to the retailer rather than promoting the resale of its products to consumers (Renninger 497F).[37] The show fee was paid in connection with the original sale of Parker's products to Gibson retail stores; the

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[36] References to the five percent payment in Parker's records as "coop advertising" are merely internal bookkeeping charges and do not reflect the actual purpose of the payments (Renninger 464).

[37] Q. You indicated on cross examination that you attended these I believe, four shows in order to build goodwill. Did you attend the Gibson Trade Show in order to build goodwill with the buyers there

A. The reason we attended the Gibson Trade Show was to get our products listed in the hands of the buyers of the Gibson stores (Renninger 497F).

show fee was not a promotional allowance made in connection with the resale of Parker's products to consumers (Renninger 497K–L; SR 51; Findings 68, 73, 97, 145, 151).

160. Similarly, the booth fee was paid in order to enable Parker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Parker's goods to Gibson retail stores. The booth fee, accordingly, was not a promotional allowance made in connection with the resale of Parker's products to consumers (Findings 64, 68, 73, 95, 145, 151).

161. After Parker discontinued its participation in the Gibson Trade Show, it experienced a 50 percent drop in its sales volume to the Gibson Discount Centers (Renninger 282, 335). [65]

162. Customers of Parker, other than stores operating under the Gibson name, were not given payments of five percent or a percentage of their total sales (Renninger 338, 340B, 343).[38]

163. Parker had a standard cooperative advertising program available to all of its retail customers (Renninger 336–37). This was also available and communicated to each Gibson Discount Center or Gibson retail store (Renninger 337–38, 339).[39] The standard cooperative advertising program of Parker was discussed with the trade show buyer, Gary Leverett. The five percent show fee paid to Gibson Products Company was not a part of this regular cooperative advertising program (Renninger 338–39).

Parker's standard cooperative advertising program required proof of performance. None of the respondents in the period 1971 to 1974 furnished proof of performance in connection with the show fee payments (Renninger 343–44).

164. In 1971 or 1972, Parker participated in tabloid advertising in connection with the Gibson Trade Show (Renninger 317).

The supplier also participated in the August 1973 tabloid mailed and delivered to customers in the areas where Gibson stores were located (Renninger 379; CX 491A–E).[40] The items promoted in the Gibson tabloid advertisement were the Big Red Soft Tip Pen and Big Red Ball Point Pen (CX 491E). For such participation, Parker was billed $250 by Gibson Discount Centers, Inc. (CX 491D). The agreement to participate in the tabloid, dated May 2, 1973, had been signed by Ray Bostrom for Parker and trade show buyer Gary Leverett for Gibson Products Co. This agreement was entitled, "Gibson Tabloid Authorization Form" (CX 491E). By credit memorandum of June 26, 1973, made out to

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[38] In 1973, Gibsons Inc. received Parker's credit memorandum for the show fee; such payments were not made available to Parker's other customers (Renninger 340–41).

[39] Parker did not have such a program in 1973 (Renninger 339). The payment of the show fee in 1973 was probably charged against a nonexistent cooperative advertising budget (Renninger 339).

[40] Such tabloids may run prior or subsequent to the period of the trade show (Renninger 381).

Gibsons Inc., Parker made the $250 remittance for such participation (CX 491A; Renninger 381–82). [66]

There is no record evidence concerning contemporaneous sales of the items promoted in the August 1973 tabloid to Gibson stores and other retailers competing with them in the resale of such merchandise.

165. Parker manufactures 252 to 300 different pens, combinations of colors and permutations thereof (Renninger 421). Parker's most expensive pen, the Presidential solid gold pen, costs $400 (Renninger 421). The least expensive pen sold by Parker is the Jotter at $2.50. Between those ranges, there are 50 to 100 different priced pens (Renninger 422). Parker's pens are sold in different types of packaging ranging from open stock boxes with twelve pens in a box to pens in individual gift boxes (Renninger 424). In addition, pens are also sold in combination with a pencil or individually (Renninger 424).

Parker's "midline products" are sold both by Parker's direct sales organization and by a network of wholesalers and distributors (Renninger 424–25). There are approximately 125 products in the "midline," which can be marketed in a number of different combinations (Renninger 425–26).[41]

The "prime line" products are primarily precious metal or stainless steel merchandise. These products fall within a higher price category and are considered Parker's jewelry or gift line (Renninger 426). Including all the combinations, there are about 125 products in this line (Renninger 427).

166. The tabulations in the record show contemporaneous transactions involving sales of goods by Parker to various Gibson stores and other Parker customers located in the same town or city (CX 506A–F). However, the record evidence does not disclose at what functional level many customers listed on CX 506A–F, other than the Gibson stores, operated at. For example, there is no way to determine on this record whether Abilene Prt. and Sty. Co. of Abilene, Texas, or Cook United, Inc. of Big Spring, Texas, were wholesalers or retailers (CX 506A). With respect to the majority of the alleged nonfavored customers listed on CX 506, complaint counsel have failed to sustain their burden of proof that Gibson retail stores and other Parker customers listed thereon operated and competed in the resale of Parker's merchandise at the same functional level. [67]

The tabulations also do not specify what products were purchased in a specific transaction. For instance, the products purchased are usually described as "midline products," "prime line products," "pens," "pencils," "sets," "refills," etc. Nor is it possible to determine from this record the price of the products involved. Parker may have 50 to 100 different prices for pens. Given the wide array of Parker products, the information in the tabulations is insufficient to make the determination of whether the goods sold to Gibson retail stores and the goods sold to alleged competitors of Gibson stores were of like grade and quality.[42]

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[41] "Pencil soft, soft tip, ball pen, pencil; ball pen, fountain pen; fountain pen, pencil. You go on and it will go on forever" (Renninger 426).

C. Tucker Manufacturing Corp.

167. Tucker Manufacturing Corp. ("Tucker"), of Leominster, Massachusetts, manufactures and offers for sale throughout the United States plastic housewares, which include trash cans, wastebaskets, laundry baskets, dish pans, pails and other products (Tocci 2141, 2142, 2153, 2162).

Tucker's products are shipped from Leominster, Massachusetts and Arlington, Texas. However, the invoices on all sales are issued by Tucker's Leominster, Mass. headquarters (Tocci 2143). The invoices in the record show sales to Gibson stores located outside Massachusetts and Texas (CX 320A–R). Tucker is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

168. Tucker employs manufacturer's representatives who are responsible for assigned geographic territories and are paid on a commission basis (Tocci 2150, 2153, 2184–85). For services provided to Tucker, the manufacturer's representative generally receives a five percent commission based on total sales in his or her territory (Tocci 2375–76). [68]

Neither H.R. Gibson, Sr., Tommy Perkins, an employee of Gibson, Sr., nor the Gibson Trade Show ever acted as a manufacturer's representative for Tucker (Tocci 2182–84, 2321, 2325; CX 312A–C).

169. Tucker attended the Gibson Trade Show approximately two times per year during the period 1969 to 1973 (Tocci 2187).

The basic service provided to Tucker by the Gibson Trade Show was the opportunity to sell its line of products to Gibson retail store buyers (Tocci 2339, 2371–72). This was the main reason Tucker participated (Tocci 2188). Services provided by the Gibson Trade Show to Tucker included bringing over prospective customers to the Tucker booth, listing the Tucker booth location in a directory and printing and distributing show sheets to Gibson retail store buyers (Tocci 2372–73).

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[42] Parker sold Jotters and refills to K-Mart, Walgreens and Gibson stores in the period 1971–1974 (Renninger 497G). There is no indication in the record, either from invoices, tabulations, or testimony, as to the approximate dates when such sales were made to K-Mart or Walgreens. No witness from Walgreens or K-Mart testified. The evidence is too sketchy to permit a finding that such sales met the statutory criteria. Sales were also made to Target stores (Renninger 279).

Such services also benefitted Gibson retail stores attending the Gibson Trade Show (Findings 71, 81; Tocci 2466, 2469–70).

170. Tucker's salaried employees staffed its booths at the Gibson Trade Show, and the expenses of the employees who attended the show were paid by the supplier (Tocci 2188, 2191).

171. In order to sell its products, Tucker's employees and representatives explained the advantages of Tucker's product line to Gibson store buyers at the trade shows; the manufacturer's representatives also made frequent calls on individual Gibson stores (Tocci 2192–93).

172. During the period 1969 to 1973, Tucker never sold its products at the Gibson Trade Show to customers other than Gibson stores. It was this supplier's understanding that other retailers were not allowed to attend (Tocci 2188–89).

173. During the 1969 to 1973 time period, the requirements imposed by the Gibson Trade Show for Tucker to participate in the shows were: reviewing its product line with Tommy Perkins and securing his approval; establishing competitive prices; making a two percent volume rebate payment per year; and, paying for rental of booth space at the trade shows (Tocci 2190–91, 2222–23).

174. Tucker prepared show sheets, which contained product and price information on merchandise presented to Gibson store buyers for their approval, for the February 1972 and February 1973 Gibson Trade Shows (Tocci 2223–24; CX 309A–M, 316A–Z–4). Tommy Perkins, the buyer at Seagoville, Texas, made the final decision with regard to pricing and other arrangements as well as Tucker's participation in the trade show (Tocci 2226). [69]

175. Tucker made the following booth fee payments to the Gibson Trade Show:*

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* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
February 14-18, 1970	2	$250.00	$500.00	Check	Ideal Travel Agency	CX 301A-B
February 12-16, 1972	2	$275.00	$550.00	Check	Ideal Travel Agency Seagoville, Texas	CX 309A-B
August 14-18, 1972	2	$350.00	$700.00	Check	Ideal Travel Agency Seagoville, Texas	CX 311A-B
February 10-14, 1973	2	$350.00	$700.00	Check	Joe W. Yeager	CX 315A-B Tocci 2201; SR 35A
August 13-17, 1973	2	$350.00	$700.00	Check		SR 35E, F; Tocci 2437-38

[70]176. In 1968 or 1969, Tucker agreed to a volume rebate after being told by Tommy Perkins that it was a requirement for participation in the Gibson Trade Show (Tocci 2185–86, 2208, 2325, 2411, 2415; CX 312A–C). "It was told to us [Tucker] that if we did not comply with his [Tommy Perkins'] request, we would not be allowed to participate in the Gibson Discount Center Trade Show" (Tocci 2209). Tucker accordingly agreed to pay a two percent volume rebate based on total sales to all Gibson stores, family owned or franchise (Tocci 2186, 2208, 2320, 2322, 2324, 2411, 2415; CX 312A–C). [71]

177. Tucker made the following show fee payments to the Gibson Trade Show:[*]

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payments on Tucker Records	
$2,176.00	3/31/72	Credit Memo	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	1970	Advertising allowance for the year 1970 [**]	CX 306A; Tocci 2246, 2251-53, 2409-10
$4,818.30	12/3/72	Credit Memo	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	4/1/72 - 10/31/72	Advertising allowance from April 1, 1972 to Oct. 31, 1972 [**]	CX 308A; Tocci 2251-53, 2269
$ 428.80	2/1/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	November and December 1972	November and December 1972 ad agreement rebate [**]	CX 310 A-C
$3,309.25	8/3/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas [***]	2%	First half of 1973	Advertising allowance [**]	CX 318 A-C; Tocci 2290, 2410-11
$1,205.49	4/4/74	Check	The Gibson Trade Show 517 Gibson St. Seagoville, Texas	2%	Last half of 1973	2% trade show fee for the last half of 1973	CX 317 A-C; Tocci 2290, 2440

[*] Tucker viewed the two percent trade show fee as going to H.R. Gibson, Sr:

By Mr. Steele [Counsel for Respondents]:

Q. Was it your understanding that the two percent payment was going to go to Mr. Herbert R. Gibson, Sr., rather than to any retail stores?

A. It was our understanding that the payment was going to H.R. Gibson, Sr.

Q. And not to the retail stores?

A. That is correct.

(Tocci 2265. See also Tocci 2320). However, the witness immediately followed by acknowledging the interrelationship between H.R. Gibson, Sr. and the retail stores, at least prior to November 1, 1972:

By Mr. Bonner [Complaint Counsel]:

Q. It was your understanding at this time, Mr. Tocci, that Mr. H.R. Gibson, Sr., in 1970, owned the retail stores?

A. Yes, it was.

(Tocci 2265)

[**] Tucker's vice-president and director of marketing, Leonard J. Tocci, testified as follows:

JUDGE von BRAND: All right.

Mr. Tocci, at the beginning of your testimony, you spoke about volume rebates in connection with certain discussions you had with Mr. Perkins; is that correct?

THE WITNESS: Yes, that is.

JUDGE von BRAND: All right.

Now, what is the difference between those volume rebates and the reference to advertising allowance which I see on the credit memorandum, CX-306-B?

THE WITNESS: It is just the mechanics of processing the paperwork within our company, as far as the volume rebate. Although, it was just terminology used as advertising....

JUDGE von BRAND: All right.

Are you telling me that, as far as this transaction was concerned, it is your testimony, the term, "volume rebate" and "advertisirg allowance" is synonymous?

THE WITNESS: Yes.

(Tocci 2252-53).

Based on this testimony, it may be fairly inferred that all of the payments made by Tucker to Gibson Products Co. and recorded by Tucker as advertising allowances were, in fact, show fee payments predicated upon a volume rebate based on total sales (See Tocci 2270, 2409-11).

[***] Although the payee on this check was Gibson Products Company, the check was endorsed: "Gibson Products Company, For Deposit Only, H.R. Gibson, Sr., D.B.A. the Gibson Trade Show" (CX 318C; Tocci 2299).

[72]178. The two percent trade show fee paid by Tucker to respondents for sales made to the Gibson retail stores in the years 1970, 1972 and 1973 was not a promotional allowance made in connection with the resale of merchandise at the retail level; rather, it was paid

for the opportunity to make a sales pitch to the Gibson stores at the trade show and is, therefore, an allowance or discount in connection with Tucker's original sale to those stores (Findings 68, 73, 97, 169, 173; SR 35Y; Tocci 2407–08).

179. Similarly, the booth fee was paid in order to enable Tucker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Tucker's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Tucker's products to consumers (Findings 64, 68, 73, 95, 169, 173).

180. Tucker ceased attending the Gibson Trade Show after 1973 because it wanted to discontinue the two percent volume rebate payments due to its low profit margin (Tocci 2326–27).

During the period following the termination of Tucker's participation in the Gibson Trade Show, Tucker experienced minimal sales volume with regard to Gibson family owned stores. The sales to such stores were: in 1974, $22,000; in 1975, $4,000; no sales in 1976 or 1977 (Tocci 2334).

181. In 1970, 1972 and 1973, Tucker neither made nor offered to make payments based on a percentage of sales to any of its customers, other than Gibson Products Co. (Tocci 2246, 2254–57, 2282–83, 2292–94). In these same years, Tucker neither made nor offered to make alternative payments for services rendered to any of its customers, other than Gibson Products Co. (Tocci 2267, 2286–87, 2294–95).

During the period 1969 to 1973, customers of Tucker, other than Gibson, that had a trade show that Tucker attended were Ace Hardware, Cotter and Company and Merchants' Buying Syndicate ("MBS") (Tocci 2212). These customers all operate at the retail level of business (Finding 369). The trade shows operated by each of these organizations were open only to member retail stores (Tocci 2213–15). Tucker attended the MBS trade show from 1964 to 1973 (Tocci 2213); it attended the Ace Hardware show from 1968 to 1972 (Tocci 2214); it attended the Cotter show from 1972 to 1977 (Tocci 2215). While Tucker paid fees for rental of booth space at each of these shows, Tucker neither offered to pay nor did pay to these customers any percentage based on sales made to the stores that attended the show (Tocci 2213–16). Furthermore, Tucker neither offered to make nor did make an alternative payment to these customers for services rendered (Tocci 2267, 2294). [73]

182. During the period 1969 to 1973, Tucker did not offer to its customers either a standard advertising allowance, a standard program of volume rebates or a cooperative advertising program (Tocci 2143, 2150).

183. During the 1969 to 1973 period, Tucker sold its merchandise to

West and Company, Howard Brothers, Wal-Mart, W.E. Walker, Perry Brothers, OTASCO, Abbey Sales, Surplus City, Sterling Storage, H.E. Butt and family owned and franchised Gibson stores (Tocci 2158–59, 2161–62). These customers all sell merchandise at the retail level (Tocci 2159–60, 2168–70, 2175–81; Finding 369).

In that period, Tucker sold trash cans, waste baskets, laundry baskets, pails and dish pans to these retailers (Tocci 2162–63).

184. Tucker manufactures approximately 100 to 120 different products (Tocci 2396; Finding 167). For example, it makes eight to ten different sized trash cans ranging from a size that could be used in restaurants to a size suitable for the home (Tocci 2397). Tucker's waste baskets and dog dishes are also of different sizes and shapes (Tocci 2397).

185. Howard Brothers and West and Company are both licensed to use and do use the Gibson name on some of their stores and their own name on other of their stores (Tocci 2390–91, 2463–64). Both have attended Gibson Trade Shows in which Tucker has participated (Tocci 2391–92). The record accordingly is unclear as to whether, in their case, sales to Howard or West and Company could properly be construed as a sale to a nonfavored customer in a transaction involving a discrimination favoring the Gibson stores. The evidence (CX 320A) does not reveal in which instances Howard Brothers and West and Company were competing with Gibson retail stores; sales to these two customers might be sales to them in their roles as Gibson licensees.

186. There is considerable variation in Tucker's products (Finding 184). There is no evidence in the record pertaining to the specific merchandise purchased by competitors of Gibson. The invoices in the record (CX 320A–R) relate only to purchases by Gibson stores. There is insufficient evidence to support a finding that Gibson stores and other customers of Tucker compete in the resale of Tucker products of like grade and quality. [74]

D. Revell, Inc.

187. Revell, Inc. ("Revell"), of Venice, California, manufactures plastic model kits, including models of airplanes, ships, cars and animals, home racing sets, train sets and craft items, which it markets throughout the United States and the world (Wells 612; Blaustein 780–81).

Revell makes sales to national accounts (whose stores are located throughout the United States), regional accounts and wholesale accounts (Blaustein 785, 789). Revell has made sales to both Gibson franchised stores and Gibson company-owned stores (Blaustein 840–41).

Revell sells and ships its products from its Venice, California manufacturing plant to customers throughout the United States. Such sales include shipments to Gibson stores located outside of California (CX 752A–Z–103; Blaustein 780–81; Wells 613). Revell is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

188. Revell entered into contracts to participate, and did participate, in the Gibson Trade Show in the years 1968 through 1976 (Wells 614–15; Blaustein 813–21; SR 25A–F, H–P). Revell terminated its participation in the Gibson Trade Show in 1977 (Blaustein 802).

189. Defining a customer as an entity for whom Revell would write up an invoice on a shipment, Revell had 500 to 600 customers in 1973, including Gibson stores (Blaustein 782). Among the retail customers to whom Revell sold its products in the period 1973–1976 were J.C. Penney, Sears, Zayre, K-Mart, the Gibson stores and W.T. Grant (Blaustein 850–52).[43] Revell, in the relevant period, also made sales to the Target stores, a chain of 59 discount retail stores located in Minnesota, Wisconsin, Illinois, Iowa, Missouri, Colorado, Oklahoma and Texas (Doyle 4288–89, 4291, 4370; CX 1335A–B).

190. In the period 1969 to 1972, Revell representatives called on Gibson stores in addition to attending the Gibson Trade Show (Wells 762). And, Revell set up a program whereby its regional sales managers would contact those individuals having buying jurisdiction for Gibson stores (Wells 720–24). Revell has neither sent invoices nor sold merchandise to Herbert R. Gibson, Sr. or to the Gibson Trade Show (Blaustein 812). [75]

191. Revell's contacts with the respondents in connection with the Gibson Trade Show were with Gary Leverett and Lynn Low. The topic of discussion at meetings in Seagoville, Texas with Leverett and Low in 1973 and 1975, respectively, was Revell's participation in the trade show (Blaustein 790–91). Beginning in March 1975, Revell was advised that the Gibson Trade Show was a selling organization which would represent Revell to sell merchandise (Blaustein 793, 798, 847–48).

Revell, however, did not regard the Gibson Trade Show as its sales representative (Blaustein 807). And, trade show personnel did not write orders for Revell after 1975. Revell's own sales staff wrote the orders (Blaustein 807). Revell regarded the Gibson Trade Show as a customer (Blaustein 807).

192. Revell and Gibson Trade Show employees coordinated blanket and makeup orders. Some of the sales by Revell were made through a

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[43] Revell's products were listed in the catalogs of Sears, J.C. Penney and Montgomery Ward (Blaustein 836).

blanket order (Finding 89; Blaustein 803–04). Beginning in 1975, sales were effected through makeup orders, whereby Revell and Gibson Products personnel set up specific orders that required Gibson stores to sign and return purchasing orders so as to receive the merchandise (Blaustein 804). In the case of the blanket orders, while the customer could modify the order, the store would receive the merchandise specified on the order if it did nothing (Blaustein 804). In 1973, 1974 and 1975, blanket orders covered all Gibson stores, franchised as well as company-owned (Blaustein 853–54).

193. In 1968, the requirements for Revell's participation in the Gibson Trade Show were payment of a booth fee and development of a selling program to be presented to all Gibson stores at the show (Wells 618). In the years 1969 through 1976, the additional requirement of payment to the Gibson Trade Show of a one percent allowance on total sales to all Gibson stores (franchised and company-owned) was imposed (Wells 619–20; Blaustein 859). [76]

194. Revell paid booth fees to the Gibson Trade Show as follows:

Date of Show	Number of Booths	Rate Per Booth	Amount Paid	Payee	
November 1969	3	$250.00	$ 750.00	Ideal Travel Agency at Seagoville, Texas	CX 731A-C; Wells 638
May 4-8, 1970	4	250.00	1000.00	Ideal Travel Agency at Seagoville, Texas	CX 735A-C; Wells 653
May 14-18, 1973	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25M
August 13-17, 1973	1	350.00	350.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25L
November 5-9, 1973	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25K
May 13-17, 1974	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25I
November 4-7, 1974	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25H
May 12-16, 1975	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25E
November 8-12, 1975	2	350.00	700.00	H.R. Gibson, Sr. at Dallas, Texas	SR 25D
May 15-19, 1976	2	350.00	700.00	H.R. Gibson, Sr. at Dallas, Texas	SR 25C
October 2-6, 1976	2	350.00	700.00	The Gibson Trade Show at Dallas, Texas	SR 25B

[77]195. Revell agreed to pay, and did pay, to the Gibson Trade Show the one percent rebate for 1969 and subsequent years (Wells 629–

30, 649–50, 660–62, 663–64; Blaustein 859). For instance, in exchange for participating in the 1975 trade show, Lynn Low suggested that Revell make a payment based on annual sales. As a result, Revell agreed to pay a one percent allowance at the end of the year on all the business which it did with the Gibson Products Company for the 1975 calendar year (Blaustein 799–800).

The one percent rebate payments were made by Revell in order to assure participation in the Gibson Trade Show and use of blanket orders (Wells 727; Blaustein 800). However, Revell had no specific understanding with any Gibson personnel as to what the one percent payment might be used for (Wells 743).

Revell had been advised that it would be the beneficiary of various services performed by the Gibson Trade Show, including marketing presentations, a directory of all Gibson stores, blanket orders, mailings and advertising. Revell was especially drawn to the trade show by a so-called Extensive Sales Program, which promised to generate orders for manufacturers (Wells 726–27; Blaustein 801–02). [78]

196. Revell made show fee payments to the Gibson Trade Show, based on one percent of total sales to all Gibson stores, as follows:

Year	Amount of Shipments	Amount Paid	Payee	Invoice Date	
1969	$313,122.26	$3,131.22	Gibson Products Co. of Seagoville, Texas	1/20/70	CX 733A, B, D
1970	372,718.00	3,727.18	Gibson Products Co. of Seagoville, Texas	2/02/71	CX 739A, C
1970	Balance due on 1970 purchases	391.76	Gibson Products Co. of Seagoville, Texas	3/19/71	CX 740B-C

[79]197. The one percent trade show fee paid by Revell to the respondents for sales made to Gibson stores in 1969 and 1970 was not a promotional allowance made in connection with the resale of Revell's products to consumers (Findings 68, 73, 97, 193).

198. Similarly, the booth fee was paid in order to enable Revell to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Revell's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Revell's products to consumers (Findings 64, 68, 73, 95, 193).

199. During the period 1969 to 1972, Revell did not make any payments to any of its customers, other than the Gibson Trade Show, based on a percentage of total sales (Wells 663–64, 750). Nor did Revell make any payments for its merchandise being listed in the catalogs of retailers such as Sears and J.C. Penney (Blaustein 855–56).

200. The Gibson Newspaper Mat Service, which prepared tabloids advertising products offered for sale in Gibson stores, prepared an

advertising tabloid for Revell. Revell paid $300.00, on November 24, 1969, to Gibson Products Co. of Seagoville, Texas for the newspaper mat service (Wells 641–42; CX 732F). Revell did not have ad mats prepared for any customers other than Gibson Discount Centers, Gibson franchised stores or Gibson family-owned stores (Wells 641).

The record, however, does not show what products were promoted for resale in the tabloid.[44] Under the circumstances, there is insufficient evidence on the question of whether customers competing in the resale of products of like grade and quality were subjected to a discrimination cognizable under Section 2(d) of the Robinson-Patman Act.

201. In 1969, 1970, 1971 and 1972, some of the accounts to whom Revell sold plastic model kits included Gibson Discount Centers, Gibson Products Co., Sears, Roebuck and Company, W.T. Grant, S.S. Kresge, J.C. Penney and G.C. Murphy (Wells 666–68; CX 752). Revell products purchased by customers such as Sears, Grant, Penney and K-Mart were shipped to customer warehouse locations with subsequent redistribution by the customer to its retail or catalog outlets (Wells 706–08). [80]

202. During each of the years in the period 1969 through 1975, there were approximately 200 items in the plastic model kits line manufactured by Revell. Since a third of the items were changed from year to year, there were about 600 to 700 different items in the product line for the 1969 to 1975 time frame (Wells 703). The prices of the different items in the plastic model kits product line may range from $1.50 to $10.00 or $20.00 (Wells 705).

203. The tabulations in the record, summarizing Revell sales in 1970 and 1971, show the following contemporaneous transactions which involve sales of goods of like grade and quality to competing customers (CX 752A–Z–103):[45]

Hattiesburg, Mississippi: Baja car[46] (Gibson - 10/1/70; Sears[47] - 8/3/70, 11/5/70).

Brownsville, Texas: Baja car (Gibson - 8/7/70; Sears - 10/2/70).

Dallas, Texas: Baja car (Gibson - 8/7/70, 11/6/70; Sears - 7/22/70, 7/23/70, 8/4/70, 8/14/70, 8/27/70, 9/18/70, 9/22/70, 9/24/70); Trano

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[44] Generally, the tabloids promoted particular items for resale. Products to be advertised in Gibson tabloids were noted as such at the trade show (Finding 110). Also compare CX 491E.

[45] The tabulations show many other transactions, including contemporaneous sales involving the Gibson stores and other customers of Revell. In the majority of these sales, however, there is no record evidence establishing the functional level at which such customers operated. Nor, in most of the transactions recorded, is there sufficient evidence to determine whether the like grade and quality requirement has been met. Given the hundreds of types of models put out by Revell and their wide price variation (Finding 202), product descriptions such as "planes," "bikes," "cars," "ships," etc. do not meet the like grade and quality requirement.

[46] The so-called "Baja car" is noted in the tabulations as, variously, Baja car, Baja 800, Sears Baja, Baja. In these instances, the product description is sufficiently precise to permit a finding that the products involved are of like grade and quality.

[47] Sears and J.C. Penney function at the retail level of operations (Finding 369).

Base (Gibson - 6/12/70; J.C. Penney[47] - 2/13/70); Dune Buggy (Gibson - 9/11/70, 11/10/70, 11/16/70; Sears - 8/18/70, 9/24/70, 10/2/70, 11/10/70); Evil Iron (Gibson - 12/27/71; J.C. Penney - 9/15/71). [81]

Irving, Texas: Baja car (Gibson - 8/11/70; Sears - 7/70).

Victoria, Texas: Baja car (Gibson - 8/7/70; Sears - 8/70, 10/2/70).

Witchita Falls, Texas: Baja car (Gibson - 5/7/70; Sears - 7/23/70, 11/4/70).

Sherman, Texas: 12 pc. Disney (Gibson - 6/23/71; J.C. Penney - 6/25/71, 7/9/71, 7/29/71, 9/15/71, 10/1/71, 11/1/71).

Revell's sales to Target (Finding 189) are not recorded in the tabulations. Nor is there other record evidence as to the specific model type, style, price or price range of the plastic model kits purchased by Target, or as to the exact dates of those purchases.

E. Regal Ware, Inc.

204. Regal Ware, Inc. ("Regal"), of Kewaskum, Wisconsin, manufactures cookware and electric appliances (Mehring 1350–51).

Regal manufactures its products at four locations in the U.S.; they are Kewaskum, Wisconsin; Wooster, Ohio; Flora, Mississippi; and Peoria, Illinois. From these points, Regal sells and ships its products throughout the United States (Mehring 1351), including shipments to Gibson stores located outside of the above four states (CX 696A–E). Regal is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

205. Regal sells to wholesalers, catalog houses, premium accounts, military exchanges, cooperatives who service retailers, hardware wholesale distributors and electrical distributors, among others (Mehring 1589). It also sells to major chain store accounts as well as non-chain store accounts. The chain store accounts, with multiple stores operating under the same name, encompass discount stores, drug stores and variety stores (Mehring 1352). The chain store accounts that were customers of Regal during the period 1971 to 1975 include Woolworth, K-Mart, Gibson, Wal-Mart, Sterling stores, Koons, Jefferson stores, Target, TG&Y and Zayre (Mehring 1352–53, 1712; CX 696A–E; Evans 3951–52; Pettit 4100). [82]

In 1975, Regal did $888,359 in business with all Gibson retail stores (SR 18R). Regal's 1975 volume of business with Target was approximately one-tenth of this amount (Mehring 1710–11). Its volume with TG & Y in that year was approximately one-fourth to one-third of the business with the Gibson stores (Mehring 1712). Regal did approximately at least four times as much business with all of the Gibson stores taken together as with Woolworth (Mehring 1628). Only S.S.

Kresge Company and the Zayre Corporation had larger purchase volumes with Regal in 1975 than the Gibson stores (Mehring 1712).

206. Regal sold and shipped goods directly to individual Gibson stores in 1971 and 1972, and continued to ship a majority of the goods in this manner in 1974 and 1975 (Mehring 1362, 1366–67).

In 1971, although shipments of merchandise were sent by Regal to individual stores, the Gibson Products Company, 519 Gibson Street, Seagoville, Texas, was the paying office with accounting responsibility for a number of individual Gibson stores (Mehring 1565–67). Regal viewed Gibson Products Company, at 519 Gibson Street, as a customer since it appeared on Regal's accounts receivable ledger (Mehring 1568).

207. Personnel who worked for Regal on a commission basis were regarded as manufacturer's representatives (Mehring 1576–77). H.R. Gibson, Sr. did not demonstrate Regal products in Gibson stores to consumers, did not put up Regal product displays in Gibson stores, did not write orders for Regal products to Gibson retail stores and did not staff the Regal booth at the Gibson Trade Show in 1971 (Mehring 1573–75). Regal did not regard H.R. Gibson, Sr., or personnel in his employ, as a manufacturer's representative (Mehring 1577). Rather, he was regarded as a special type of representative; other special representatives were involved in the areas of military sales and direct mail sales (Mehring 1578). In 1971 through 1975, Gibson was the only chain store account that fell into this category of special representation (Mehring 1581).

208. Regal participated in at least one Gibson Trade Show per year in the years 1971 to 1975, and often attended two shows per year, generally in February and August (Mehring 1382). It attended Gibson Trade Shows in 1977, and plans to participate in future shows (Mehring 1382). [83]

209. Regal participated in the Gibson Trade Show because of the opportunity to meet the greatest number of buyers within a limited period of time in one place (Mehring 1383, 1646–47).

210. Approximately four to six Regal employees attended the trade shows (Mehring 1384, 1482). Regal always paid the expenses of its sales personnel, all of whom were salaried employees of Regal (Mehring 1387, 1477; CX 660A–E, 664A–E, 670A–D, 676A–E, 690A–H, 695A–E).[48] At the trade shows, Regal verbally described how its products worked and discussed selling techniques with buyers (Mehring 1385, 1486).

211. Regal and the Gibson Trade Show utilized show sheets as actual order forms in connection with the price listings of Regal items

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[48] Not all of the expenses in the listed documents necessarily relate to the Gibson Trade Show, since Regal personnel attending the show would also attempt to call on other customers (Mehring 1481, 1605–06).

to be offered for sale at the trade show (CX 647C, 649A–C, 659A–B, 663A–N, 665, 669A–N, 671A–M, 675A–M, 689A–I; Mehring 1511–12). Blank forms were submitted to Regal, who filled them in with product information and price listings. The show sheets were then forwarded to the Gibson Trade Show for bulk printing and distribution (Mehring 1511). The show sheets were not final until initialed by someone at Regal (Mehring 1516–17).

The show sheets were important in helping to sell Regal products to the Gibson retailers (Mehring 1647). In preparing show sheets, Gibson personnel might inform Regal that certain items were inappropriate for Gibson stores. Regal considered this helpful (Mehring 1645).

212. The requirements for participation at the Gibson Trade Show during the years 1971 to 1975 were: payment of a booth fee; and, payment of a show fee which consisted of a percentage of total annual sales to all Gibson stores (Mehring 1385–88; CX 672B). [84]

213. Regal made the following booth fee payments to the Gibson Trade Show during the period 1969 to 1977: */

Date of Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
July 10, 1969	2		$450.00	Check	Gibson Discount Center Market Hall 2200 Stemmons Freeway Dallas, Texas	CX 642A-C
February 14-18, 1970	2		$500.00	Check	Gibson Products Co. c/o Ideal Travel Agency 519 Gibson Street Seagoville, Texas	CX 643A-C
February 8-12, 1971	2		$550.00	Check	Gibson Discount Center February Trade Show Market Hall 2200 Stemmons Freeway Dallas, Texas	CX 645, 646A-C
August 16-20, 1971	2		$550.00	Check	Ideal Travel Agency	CX 648A-F
February 12-16, 1972	2		$550.00			CX 658
August 14-18, 1972	2		$700.00	Check	Ideal Travel Agency	CX 661A-E
February 10-14, 1973	2		$700.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 668A-C; SR 18I
August 13-17, 1973	2		$700.00	Check	H.R. Gibson, Sr.	CX 674A-E; SR 18H
February 9-13, 1974	2		$700.00	Check	The Gibson Trade Show	CX 681, 681A-C
August 12-16, 1974	2	$350.00	$700.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 687, 688A-C; SR 18F
February 8-12, 1975	2	$350.00	$700.00	Check	H.R. Gibson, Sr. The Gibson Trade Show Seagoville, Texas	CX 692, 693A-C
August 4-8, 1975	2	$350.00	$700.00			SR 18D**/
February 9-13, 1976	2	$350.00	$700.00			SR 18C**/
January 3-7, 1977	3	$225.00	$675.00			SR 18A**/

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

**/ The record evidence is deficient as to further information about these payments; no copies of checks were introduced into the record, nor was testimony offered, such as would establish that these payments were actually made.

[85]214. Regal paid the Gibson Trade Show a show fee in order to meet what it viewed as its competition (Mehring 1673–77). For instance, Regal learned that a competitor, Oster, was going to participate in the trade show and would pay a four percent show fee (CX 672D; Mehring 1548, 1676). Regal took such facts into consideration in deciding the amount of the show fee that it would pay (Mehring 1548–49, 1675).

The show fee percentage paid to the Gibson Trade Show was two percent in 1971, 1972 and 1973 (Mehring 1387–88; CX 677B). In 1974, the percentage was increased to three percent and has remained at that level ever since (CX 677B; SR 18B, E, G; Mehring 1388, 1390, 1417, 1422, 1562–63, 1648). [86]

215. Regal made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment on Regal Records	
$13,0[illegible]	2/12/70	Check	Gibson Products Co. Attn: [illegible]	2%	1969	Volume rebate	CX 644A-C
11,[illegible]	1/20/71	Check	Gibson Products of Seagoville	2%	11 months of 1970 sales	Rebate of 2% advertising allowance for 11 months of 1970 sales to Gibson stores*/	CX 650A-C
[illegible]	12/29/71	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	1971	1971 Advertising - 2% of sales**/	CX 651A-C, 652A-C; Mehring 1343-44
12,[illegible]	12/29/72	Credit Memo	–	2%	1972	Advertising allowance for 1972*/	CX 653A-C, 655, 672C
[illegible]	10/2/73	Credit Memo	The Gibson Trade Show 517 Gibson St. Seagoville, Texas	3%	Jan.-June 1973	Show fee for Jan. - June 1973	CX 670A-C, 678
[illegible]	1/23/74	Credit Memo	–	3%	July-Dec. 1973	Show fee for July-Dec. 1973	CX 666, 678E 680A-B, Mehring 1649-50
11,[illegible]	10/17/74	Credit Memo	–	3%	Jan.-June 1974	Show fee for Jan. - June 1974	CX 685, RX 101
8,313.18	2/3/75	Credit Memo	–	3%	July-Dec. 1974	Show fee for July-Dec. 1974	CX 691
[illegible]	5/20/75	Check	The Gibson Trade Show 1246 E. Ledbetter Dallas, Texas	3%	Jan.-June 1975	Show fee for Jan. - June 1975	CX 102
17,[illegible]	1/12/76	Check	–	3%	July-Dec. 1975	Show fee for July-Dec. 1975	[illegible]
18,[illegible]	9/22/76	Check	The Gibson Trade Show 519 Gibson St. Seagoville, Texas	3%	Jan.-June 1976	Show fee for Jan. - June 1976	[illegible]
14,[illegible]	2/9/77	Check	The Gibson Trade Show 1246 E. Ledbetter Dallas, Texas	3%	July-Dec. 1976	Show fee for July-Dec. 1976	[illegible]

*/ While the documents introduced into evidence describe these payments as advertising allowances, there is reason to doubt that description. Unlike the other records of payments made for advertising by Gibson of Regal products (see the chart detailing advertising allowances made by Regal to the Gibson Trade Show *infra*), the two instant payments cover blanket periods of 11 months in one case and one year in the other, do not specify whether the advertising was in tabloid form, in print ads or in some other form and do not specify what product(s) or product line(s) were advertised. Further, the payments are for substantially large sums and are within the same monetary range as the remaining show fee payments during the 1969 to 1976 time period.

**/ While the documents introduced into evidence describe this payment as an advertising allowance, the Regal witness admitted that the payment was, in fact, a show fee (Mehring 1343-44). Such an admission casts further doubt on the descriptions of the two payments referred to in the footnote above and suggests that they, too, may well be show fees.

[87]216. The three percent show fee paid by Regal to the Gibson Trade Show was viewed by Regal as payment for the trade show's services in helping Regal make sales to retailers (Mehring 1648-49). Regal did not consider the three percent show fee, or the two percent show fee paid prior to 1973, as promotional payments (Mehring 1648-49).

217. The services received by Regal from the trade show in exchange for the percentage payments made from 1971 through the present basically consisted of the opportunity to sell to buyers for the Gibson organization (Mehring 1392). The show fee was paid in connection with the original sale of Regal's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Regal's products to consumers (Findings 68, 73, 97, 209, 212, 216).

218. Similarly, the booth fees were paid in order to enable Regal to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Regal's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Regal's products to consumers (Finding 64, 68, 73, 95, 209, 212).

219. In 1972, Regal sold its products to Woolworth and TG & Y, in addition to Gibson stores (Mehring 1400; Finding 205). It did not make payments to Woolworth or TG & Y or any other chain store accounts

based on volume of sales in that year (Mehring 1398, 1400). Nor did Regal make such payments to Woolworth in 1973 (Mehring 1405–06).

Regal did not make the three percent payment based on volume of total sales available to Woolworth in 1975. It only made a one percent advertising allowance available to Woolworth (Mehring 1422; Finding 223).

220. In the period 1969 to 1975, Regal had a standard two percent advertising allowance available for all its customers. This was the only promotional allowance made available to the Gibson stores in that period (Mehring 1392, 1641). [88]

221. Regal made the following advertising allowances to the Gibson Trade Show from 1971 onward:

Amount	Payee	Date of Payment	Form of Payment	Description of Payment on Regal Records	
$ 880.80	Gibson Products Co. Seagoville, Texas Attn.: Tommy Perkins	12/22/71	Credit Memo	Advertising allowance on #W540AV and 7 Buckeye Decorated sets appearing in November tab	CX 654A-B
$ 1,161.75	Gibson Products Co. 519 Gibson St. Seagoville, Texas	4/17/72	Credit Memo	Advertising allowance on W740 Set in the April tab	CX 661A, C; Mehring 1429, 1431
$ 500.00	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3/22/72	Credit Memo	Advertising allowance for Spring Specials	CX 661B
$ 500.00				IL 6726 in pre-Christmas tab. */	CX 672C
$ 300.00				W820 in Spring tab. */	CX 677D
$ 500.00				IL 6727 in November tab. */	CX 677B, D

*/ The record evidence does not provide any further information as to these payments; neither copies of invoices nor copies of checks or credit memos were introduced into evidence, so as to establish the exact details of these payments and whether they were, in fact, paid out.

[89]222. The tabloids utilized in 1972 were under Regal's standard advertising program. Regal did not specify whether an advertisement was to run in a tabloid, as a print ad or in some other format (Mehring 1432–33).

The Gibson Trade Show discontinued the procedure of running tabloids for Regal products in 1973 (Mehring 1431–32).

223. Regal made available to Woolworth its regular two percent promotional allowance for promotion of Regal products during the 1969 to 1975 time period (Mehring 1633–34). However, Woolworth demanded and obtained a special promotional package from Regal.

Woolworth received a one percent advertising allowance and a one percent price reduction based on invoice price[49] (Mehring 1635-36). Under that arrangement, in 1973, 1974 and 1975, Woolworth received approximately a one percent allowance on print advertising. The Gibson stores, in that period, received a two percent allowance for print or tabloid advertising (Mehring 1414, 1417-18, 1421-22, 1425-26). The Gibson stores, however, did not receive a price reduction as part of their promotional program from Regal (Mehring 1641).

224. Regal sold its products to TG & Y in 1973, 1974 and 1975 (Mehring 1423). Regal made available to TG & Y an advertising allowance based on TG & Y's sales in the 1973 to 1975 period. TG & Y availed itself of the advertising allowance offer by running a tabloid which included Regal products (Mehring 1423-24, 1433).

Regal made various promotional offers available to TG & Y during the 1971 to 1975 time period (Pettit 4162). Different Regal products could have had different percentage advertising allowances or, even, lump sum advertising allowances (Pettit 4237-38). Promotional offers made by Regal to TG & Y were a thousand dollars credit memo in exchange for which TG & Y had to buy Regal products and advertise them in their company-wide advertising program (Pettit 4169-70, 4232), as well as other lump sum dollar amounts (Pettit 4173; SR 111F-G).

225. Regal sold its products to Target in 1975 (Mehring 1442). It made its standard advertising program available to Target in that year (Mehring 1443-44). [90]

Other than an advertising allowance based on two percent of total sales under Regal's standard advertising program (Mehring 1443), Regal made no other percentage of total sales payments available to Target in 1975 (Mehring 1444).

226. The two percent advertising allowance paid by Regal to Gibson retail stores was separate and distinct from the three percent of total sales volume paid to the Gibson Trade Show in 1973 (Mehring 1417; CX 683A).

227. The record does not support a finding that the Regal tabloid payments to respondents were beyond the scope of its regular advertising programs available to Regal's other customers and, thus, discriminatory (Finding 220).

228. Regal offered various promotional services to its customers who did not have trade shows. These services included in-store demonstrations of Regal products by Regal personnel for consumers at

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[49] Woolworth placed Regal products in a tabloid as part of its promotional arrangement with Regal. The one percent price reduction in Woolworth's net invoice price was Regal's payment for the tabloid advertising (Mehring 1644-45).

the retail level, store display stands and product knowledge sessions where Regal personnel discussed Regal products with retail store sales personnel (Mehring 1488–90, 1601). These services were an extension of Regal's sales activities and were expected by its customers; they were not part of a formal program (Mehring 1493).

229. Regal manufactures about eight different cookware lines under the Regal name (Mehring 1370).

230. Regal also manufactures so-called "traffic appliances," which are small, hand-held electrical appliances such as coffee makers, fry pans, corn poppers, fondues, hot pots, griddles, slow cookers and french friers (Mehring 1370, 1611). Regal lists all of the electrical appliances that it produces under the heading, "traffic appliances" (Mehring 1377). The traffic appliance category is comprised of entirely different products. Including color variations, Regal manufactures over 50 different types of traffic appliances (Mehring 1610–11). Regal's customers generally do not purchase all of the traffic appliances which it manufactures (Mehring 1612–13).

Regal manufactures approximately 10 different models of coffeemakers, with color variations within each model (Mehring 1613, 1617–19). For instance, during the 1969 to 1975 time period, one type of Regal coffeemaker, called Poly Perk, had four different sized models, with three different colors in each size, to serve different consumer needs and preferences (Mehring 1617–19). [91]

During the 1969 to 1975 time period, the electric fry pans manufactured by Regal were all Teflon coated, with various exterior color combinations; there were two sizes (Mehring 1619–20).

Regal manufactures only one basic model of a corn popper. There were only color variations in the fondue and slow cooker models. There were different models, aside from color variation, of the other electrical products in the traffic appliance category (Mehring 1620).

231. There are differences in quality, color, styling and metals used in the various cookware lines manufactured by Regal (Mehring 1372, 1621–22). During the 1969 to 1975 time period, Regal's cookware lines fell into two basic subcategories, Teflon coated and non-Teflon coated interior surfaces (Mehring 1619–20, 1622–24). The purpose of this differentiation was to meet consumer needs and preferences (Mehring 1623).

Regal sold as many as four cookware lines to Gibson stores in 1971. The names of these lines are Duncan Hines, Imperial, Buckeye and Mardi Gras (Mehring 1371–72). There are different individual products and sets within each of the four lines (Mehring 1620–24). Regal's customers, *i.e.*, wholesale houses, distributors, central buyers, could purchase products within each of the four lines either individually or in sets (Mehring 1621–22).

The Duncan Hines and Imperial lines are made of stainless steel, but of different weights. The Buckeye and Mardi Gras lines are made of aluminum, and are also of different weights (Mehring 1373).

During the 1969 to 1975 time period, the Buckeye line consisted of the following six individual products: three different sized saucepans, a Dutch oven and two different sized fry pans. The purchase of these product differentiations was to meet consumer needs (Mehring 1621).

232. The record shows that Regal sold traffic appliances to the following customers in the years indicated:

Gibson Stores	1971 - 1975
K-Mart	1973 - 1975
T.G. & Y.	1974, 1975
Woolco	1975
Target	1975

(Mehring 1378–79, 1380, 1442).

[92]In 1969 to 1975, TG & Y purchased Regal products, including so-called "staple items" such as Poly Perk coffee makers, tea kettles, pots and pans (Pettit 4102).

In 1975, Regal sold its Duncan Hines cookware line to TG & Y and Gibson stores (Mehring 1374), its Imperial cookware line to K-Mart, TG & Y, Target and Gibson stores (Mehring 1374–75, 1442), and its Buckeye cookware line to TG & Y and Gibson stores (Mehring 1375).

233. The array of Regal products carried by retailers, including Gibson stores, varies widely (Mehring 1624).

234. The tabulations in the record, summarizing Regal sales between 1969 and 1975, show the following contemporaneous transactions which appear to involve sales of goods of like grade and quality to competing customers (CX 696A–E):[50]

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[50] The tabulations and record testimony disclose other contemporaneous transactions. However, in many of these sales, there is no record evidence of the functional level that the customer was operating at. Thus, it is not possible to determine whether the customer was competing with Gibson retail stores in the resale of Regal's products. Moreover, there is no record evidence showing that these transactions involve goods of like grade and quality. For instance, the tabulations describe certain products as "Dutch oven," "fry pan," "Poly Perk" and "pan." Poly Perks come in four different sizes (Finding 230). Dutch ovens and fry pans also come in different sizes, are made of different metals, come in different weights and styles, and have Teflon or non-Teflon interior surfaces (Finding 231). The difference in interior surfaces may alone vitiate any showing of like grade and quality, although this difference in combination with the others just listed remove any possibility of like grade and quality having been established for these products. Fry pans may be electric or non-electric (Findings 230, 231).

The testimony discloses that, in 1975, Regal sold each of its four cookware lines as sets to Gibson retail stores and certain stores allegedly in competition with the Gibson stores (Finding 232). However, there is no record evidence, in the form of documentation or otherwise, stating the places and dates of these transactions. Moreover, each of the four cookware lines sold were either Teflon coated or non-Teflon coated (Finding 231). Thus, like grade and quality was not established for these products.

[93]Shreveport, Louisiana: Cups[51] (Gibson - 3/14/72, 3/27/72; TG & Y[52] - 4/10/72); Pot-o-Plenty[51] (Gibson - 10/10/73; TG & Y - 9/7/73); Poly Urn[51] Gibson - 9/20/73, 9/25/73; TG & Y - 11/19/73).

Lubbock, Texas: Poly Urn[51] (Gibson - 3/2/73, 9/14/73; TG & Y - 3/13/73, 11/19/73); Tea Kettle[51] (Gibson - 9/14/73, 9/10/74, 10/7/74, 12/12/74; TG & Y - 9/26/73, 2/18/74, 10/25/74); Bowls[51] (Gibson - 2/6/74; TG & Y - 2/19/74).

F. Waltham Watch Company

235. Waltham Watch Company ("Waltham"), of Chicago, Illinois, manufactures and sells watches, jewelry and clocks (Levitt 1764–65).

Waltham sells and ships its goods from Chicago to throughout the continental United States, including sales to Gibson stores located outside of Illinois (Levitt 1765; CX 216A–D). Waltham is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such interstate sales, are in the course of such commerce.

236. Waltham sold its products to wholesalers for resale to catalog houses and to premium houses in the 1969 to 1975 period (Levitt 1993–94). It also sold to retailers such as the Gibson stores (CX 205A–B).

237. Waltham had a total sales volume for watches of $185,716.25 with all Gibson stores during 1973 (CX 205A–B). Most of Waltham's sales of watches to Gibson stores in 1973 were shipped to individual stores (Levitt 1838; CX 209B).

238. During the 1969 to 1975 period, Waltham merchandise could not be displayed at the Gibson Trade Show unless listed on show sheets (Levitt 1868). [94]

Waltham furnished the product and price information contained in the show sheets, which were prepared and distributed by the Gibson Trade Show for use at their various shows in connection with the placement of orders (CX 194A–F, 196A–K, 208A–C, 212A–N; Lehman 1257–58, 1261, 1264, 1266; Levitt 1874–75). The show sheets could serve as prospective orders, with the individual Gibson retail stores filling in the blanks regarding quantity (Levitt 1987).

During the 1969 to 1974 time period, Waltham presented merchandise to Gibson buyers; the buyers, then, preselected merchandise and authorized the merchandise to be listed on the show sheets (Levitt 1863–64, 1866–67, 1877–78). Waltham's sales representative considered this procedure to be a sales presentation (Levitt 1866, 1881).

The Gibson Trade Show buyers, such as Gary Leverett, preselected merchandise for the benefit of the Gibson stores attending the trade show throughout the 1969 to 1975 time period (Levitt 2007–08). As such, Leverett was acting on behalf of the Gibson stores (Levitt 2008). Distribution of the show sheets at the trade show was a benefit to the Gibson stores as well as an effective selling tool for Waltham (Levitt 1988, 2008, 2020–22).

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[51] There is no record evidence indicating that there are variations in any of these products, such as materials used, range of sizes, weight or electric versus non-electric operation.

[52] TG & Y functions at the retail level of operations (Finding 369).

239. Belva Gibson participated at various times in physically selecting the merchandise, usually jewelry, that she thought would sell in Gibson stores (Levitt 1826–27).

240. In 1971, Gary Leverett, the jewelry buyer for Gibson Products Company, selected four models of watches from Waltham's sales representative for purchase. The transaction took place in Seagoville (Levitt 1823–25).

Although Leverett assumed the title of merchandising manager in 1973 or 1974, he continued to perform the same functions he had performed in earlier years as far as Waltham was concerned (Levitt 1913–14). Waltham's sales representative regarded Gary Leverett, who held the title of merchandising manager in 1973 (CX 203A; Levitt 1978–79), as a buyer (Levitt 1976).

241. During the 1969 to 1974 time period, Waltham made no sales at the Gibson Trade Show to stores other than the Gibson Discount Centers (Levitt 1899–1900).

242. At the Gibson Trade Shows, trade show employees introduced new franchise owners to Waltham personnel and asked Waltham to assist in writing an opening order for such stores. Gibson, Sr. also brought new managers to the Waltham booth and assisted them in selecting goods for the new store (Levitt 1904). [95]

At the trade shows, new store managers, Leverett and the Waltham sales representative discussed merchandise. Leverett assisted the new store manager in making decisions about what to buy (Levitt 1907, 1910). For already existing stores, the store managers would be able to finalize orders (Levitt 1908–09).

243. Neither Gibson, Sr. nor his employees staffed the Waltham booths at the trade shows in the 1969 to 1974 period; those booths were run by Waltham personnel (Levitt 1911–12). Leverett did not perform a selling function on behalf of Waltham at the trade shows (Levitt 1911).

244. The requirements imposed upon Waltham by the Gibson Trade Show to participate in the shows were: payment for the rental of booth space; and, payment of a five percent allowance based on total watch sales to all Gibson stores (Levitt 1803–05, 1809–10, 1829–31, 1834–35, 1838). [96]

245. Waltham made the following booth fee payments to the Gibson Trade Show:

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
May 14-18, 1973	1	$350.00	$350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 193A-B
August 1973	6	$350.00	$2,100.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 197A-B
Nov. 5-9, 1973	1	$350.00	$350.00	Check	H.R. Gibson, Sr. 519 Gibson Seagoville, Texas	CX 198A-B
February 1974	6	$350.00	$2,100.00	Check	H.R. Gibson, Sr. 517 Gibson St. Seagoville, Texas	CX 206A-C
May 13-17, 1974	1	$350.00	$350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 210A-B
Aug. 12-16, 1974	6	$350.00	$2,100.00	Check	H.R. Gibson	CX 211A-E

[97]246. From 1969 to 1974, Waltham set up a warehousing allowance to Gibson Products Company, payable in merchandise. The allowance was five percent of total sales of watches to all Gibson retail stores, regardless of whether the watches were shipped directly to individual stores or to a warehouse (Levitt 1803–05, 1838; Lehman 1284, 1301–02). In the case of Waltham's Dallas area representative, 99.9% of the shipments were shipped directly to the Gibson stores (Levitt 1838. See also CX 209).

247. Belva Gibson participated in discussions with Waltham's sales representative in 1971 as to the amount, $118,768, that was to be paid on warehousing (Levitt 1813–14, 1822–23, 1825–26; CX 201C).

248. Sales made at the Gibson Trade Show to individuals who leased jewelry departments in Gibson stores were not included as part of the total annual sales to Gibson stores from which the warehousing allowance was computed (Levitt 1997; Finding 257).[53]

249. Waltham did not refer to or make use of the term, "trade show fee." It used, instead, the term, "warehousing allowance" (Levitt 1829–31, 1834–35; CX 203A). The five percent warehousing allowance had nothing to do with advertising or otherwise promoting the resale of Waltham products (Levitt 1968–69; Lehman 1284). Warehousing allowances are, in fact, trade show fees in the case of Waltham's dealings with Gibson stores. Such show fees effectively operate as

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[53] In 1975, 29% of the sales made at the Gibson Trade Show were made to such leased jewelry departments (Levitt 1997).

price reductions to the Gibson stores, and were paid in connection with the original sale of Waltham's products to Gibson retail stores (Findings 68, 73, 97, 244).

250. Similarly, the booth fee was paid in order to enable Waltham to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Waltham's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Waltham's products to consumers (Findings 64, 68, 73, 95, 244). [98]

251. Waltham made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment on Waltham Records	
$7,416.70	11/24/70	House Order	Gibson Products Co. Attn: Gary Leverett 319 Gibson St. Seagoville, Texas	3%	1969	Warehousing allowance for 1969 purchases	CX 200A-Levitt 1 31
$5,937.75	5/20/71	House Order	Gibson Products Co. 319 Gibson St. Seagoville, Texas Attn: Gary Leverett	3%	1970	Warehousing allowance	CX 201A-Lehman 1 72, Levi 1813-15, 1822-23, 1829-31
$6,776.00	3/13/72	House Order	Gibson Products Co. 319 Gibson St. Seagoville, Texas Attn: Gary Leverett	3%	1971	Warehousing allowance	CX 202A-Lehman 1 73; Levi 1829-31
$7,290.00	4/16/73	Credit Auth.	Gibson Products Co. 319 Gibson St. Seagoville, Texas Attn: Gary Leverett	3%	1972	Warehousing allowance	CX 203A-Lehman 1 Levitt 1 31
$8,387.00	3/11/74	House Order	Gibson Products Co. 319 Gibson St. Seagoville, Texas	3%	1973	Warehousing allowance	CX 209A, Levitt 1 31

[99]252. During the 1969 to 1974 time period, Waltham conducted a cooperative advertising program that offered 10 percent off the face of invoices. The program covered watches, though not clocks or jewelry, and was made available to all retail and discount stores, but not to catalog stores. Retail and discount stores did not have to meet any requirements in order to participate in the advertising program (Levitt 1797–1800, 1858; CX 214A–B, 215A–B).

Payments under Waltham's cooperative advertising program (see, *e.g.*, CX 214A–B) were made by credits to the customer's account (Lehman 1284). [100]

253. Waltham made the following advertising allowance payments to the respondents:

Amount	Date of Payment	Form of Payment	Payee	Description of Payment	
$300.00	7/25/73	Check	Gibsons 519 Gibson St. Seagoville, Texas	For advertising ladies' and men's rings and pendants in June tab	CX 195A-D
$250.00	9/16/74	Credit Auth.	Gibson's Inc. 519 Gibson St. Seagoville, Texas	Christmas Tabloid, 1973	CX 213A-B

[101]254. The prerequisite showing of sales of goods of like grade and quality involved in such tabloid promotions with respect to Gibson stores and other Waltham customers competing in the resale of such goods has not been made (Finding 259).

255. Waltham's line of watches were distinguished by price, style, color and quality (Levitt 1778, 1958). There were differences in the number of jewels; some watches were larger than others; some had dials of varying colors; some were stainless steel; some were calendar, some day and date; some were automatic, some not (Levitt 1958–60). Waltham had approximately 500 watches, priced from $10 to $1,000 (Levitt 1776).

Waltham considered one group of watches to be those in the $15 to $50 category; other groups were in the $50 to $75 and $75 to $100 categories (Levitt 1780). The $15 to $50 group of watches, however, is comprised of a large number of individual types of watches (Levitt 1957–58). No customer of Waltham ever purchased all of the types of watches in the $15 to $50 group (Levitt 1959).

256. Waltham sold watches in the $15 to $50, $50 to $75 and $75 to $100 categories to Gibson stores during the 1969 to 1974 time period (Levitt 1775, 1780–81, 1794). The $15 to $50 group of watches purchased by Gibson stores might be entirely different from the group of watches in the same price range sold to another Waltham customer (Levitt 1957). Furthermore, individual Gibson stores did not necessarily purchase the same group of $15 to $50 watches as other Gibson stores (Levitt 1957, 1959).

257. There were leased jewelry departments in some of the Gibson family owned and franchise stores in various locations, including Dallas, Fort Worth, Lubbock and Amarillo, Texas (Levitt 1954–55). Waltham sold its merchandise to individuals who leased such space in Gibson stores (Levitt 1996–97). Resale of Waltham products by leased departments in Gibson stores is not a sale by the Gibson store (Levitt 1956, 1986–87).

258. Waltham made direct sales of its watches in the $15 to $50 group to the lease division of Zale Company, which operated leased departments in other stores[54] during the 1969 to 1974 time period (Levitt 1789–90, 1930–31). There is no record evidence as to the specific model, style or price of the watches purchased by Zale, nor is there any evidence of the exact dates of those purchases. [102]

Waltham watches were carried in all Target stores in 1974 and 1975 (Doyle 4367–70). There is no evidence in the record as to the model, style, price or price range of the watches purchased by Target, nor is there any evidence of the exact dates of those purchases.

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[54] For instance, Zale leased the jewelry department in Globe stores (Levitt 1946).

259. The tabulations in the record, summarizing sales by Waltham to Gibson stores and other customers in New Mexico and Texas during 1973 and 1974, reveal contemporaneous transactions involving sales of watches by Waltham to various Gibson stores and other Waltham customers located in the same town or city (CX 216A–D).

However, there is virtually no record evidence regarding the functional level of any of the alleged nonfavored customers who are shown in the tabulations.[55] They may be wholesalers, retailers, warehousers or even perform some other function. Thus, the record evidence does not show that these alleged nonfavored customers were in competition with Gibson retail stores.

Moreover, the tabulations do not specify what products were purchased in a specific transaction. The only description given for the type of products purchased in all of the transactions shown is "watches." There is also no way to determine the prices of the products involved.[56] Given the great assortment of Waltham watches,[57] the information contained in the tabulations is insufficient to make the determination of whether the goods sold to Gibson retail stores and the goods sold to alleged competitors of Gibson stores were of like grade and quality. [103]

G. Wagner Products

260. E. R. Wagner Manufacturing Company, Wagner Products Division ("Wagner"), of Hurtisford, Wisconsin, manufactured and sold carpet sweepers, rug shampooers, rug shampoo, an electric clothes dryer and home food craft kits during the period 1969 through 1973 (Hornick 3156–57).

Wagner sells and ships its products throughout the United States and Canada (Hornick 3156–57), including shipments to Gibson Stores located outside of Wisconsin (CX 640A–N). Wagner is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such sales, are in the course of such commerce.

261. In 1973, Wagner had approximately 300–400 customers for its carpet sweeper product line, including Gibson, OTASCO, TG & Y, White stores, Nash Hardware, hardware retailers and hardware distributors and wholesalers (Hornick 3164–65, 3211–12, 3214, 3259–61).

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[55] Southwestern Drug, one of the alleged nonfavored customers (CX 216C), is a wholesale drug distributor (Levitt 1784) and, thus, is not at the same functional level of operations as the Gibson stores.

[56] Waltham watches fall into several price categories, with many watches within each category (Findings 255, 256).

[57] Finding 256.

In 1973, Wagner's volume of sales on carpet sweepers to all of its customers was approximately $600,000 to $700,000 (Hornick 3194). In the same year, Wagner's sales of carpet sweepers to all the Gibson stores amounted to $69,531.73, or approximately 10% of its total sales volume on this product (Hornick 3191-93; CX 634D, 637D).

262. Wagner received orders from different Gibson franchisees in their individual capacity. The products were shipped to the franchisees' stores (Hornick 3239).

263. Wagner's sales force was comprised of independent manufacturer's representatives located throughout the country. Its manufacturer's representative in the Texas and Oklahoma area during the 1969 to 1973 period was the Weldon Jacobs Company ("Jacobs").[58] Jacobs was paid on a commission basis (Hornick 3157). The duties of Wagner's manufacturer's representatives were to solicit business and service Wagner's accounts (Hornick 3158).

Neither H. R. Gibson, Sr., Tommy Perkins nor any of Gibson, Sr.'s employees was ever a manufacturer's representative for Wagner (Hornick 3196).

264. Wagner participated in the Gibson Trade Show in the years 1969 through 1973 (Hornick 3167). Wagner's purpose in [104]attending the Gibson Trade Show was to be able to display and sell its products to the Gibson retail store buyers who were at the show (Hornick 3169-70, 3217-18, 3227, 3250). Wagner utilized show sheets in connection with the Gibson Trade Show (Hornick 3170; CX 632A-B, 635A-B).

265. The requirements imposed upon Wagner by the Gibson Trade Show for Wagner to participate in the show were: payment for rental of booth space; and, in 1973, payment of a percentage fee based on total sales to all Gibson stores (Hornick 3167, 3190-91, 3195). [105]

266. Wagner made the following booth fee payments to the Gibson Trade Show:*

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[58] Jacobs was Wagner's manufacturer's representative at the Gibson Trade Show (Hornick 3196).

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
1970			$125.00	Check	Weldon H. Jacobs Co. Inc.** 1616 Dallas Trade Mart Dallas, Texas	CX 626A-C
August 1970			$125.00	Check	The Weldon Jacobs Co., Inc.** 1616 Dallas Trade Mart Dallas, Texas	CX 627A-C
February 1971			$125.00	Check	Weldon Jacobs Company** 1616 Dallas Trade Mart Dallas, Texas	CX 628A-C
November 1971			$125.00	Check	The Weldon H. Jacobs Co., Inc.** 1616 Dallas Trade Mart Dallas, Texas	CX 629A-D

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence did not establish such information.

**/ Wagner's manufacturer's representative, Jacobs, would pay the bills for rental of booth space at the Gibson Trade Show and, subsequently, was reimbursed by Wagner (Hornick 3167-68, 3251).

[106]267. In 1973, and again in 1974, Wagner agreed to pay to the Gibson Products Co. three percent of total sales to all Gibson retail stores for promotional services rendered (Hornick 3190-91, 3195, 3198-99; SR 17B, C). Wagner agreed to make such show fee payments because "[i]t was our understanding that if we didn't do that, we might not be able to get into the trade show" and, if that were to result, "[w]e felt that our sales would suffer" (Hornick 3195, 3202, 3215, 3237). [107]

268. Wagner made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Wagner Records
$1,234.36	7/19/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3%	January-June 1973	Volume rebate through June 1973*
851.59	4/1/74	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3%	July-December 1973	Volume rebate - July-Dec. 1973 - Our credit memo #56855**

* CX 634A-D

** CX 637A-D; SR 17A.

[108]269. Wagner did not receive any services from the Gibson Trade Show for the payment of the three percent show fee in 1973, above and beyond the services it had received in prior years when it

had not made any show fee payments (Hornick 3195). The show fee was paid in connection with the original sale of Wagner's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Wagner's products to consumers (Findings 68, 73, 97, 264, 265, 267).

270. Similarly, the booth fee was paid in order to enable Wagner to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Wagner's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Wagner's products to consumers (Findings 64, 68, 73, 95, 264, 265).

271. Wagner did not have a volume rebate program in 1973 (Hornick 3196). In that year, Wagner neither made nor offered to make payments based upon a percentage of total sales or alternate payments to any of its customers, other than Gibson Products Company, for services rendered (Hornick 3200–02).

During the 1969 to 1973 period, Wagner neither made nor offered to make payments based upon a percentage of total sales to any of the other trade shows that it attended (Hornick 3202–03).

272. In the years 1969 to 1973, Wagner neither made nor offered to make booth payments or alternate payments, other than newspaper or tabloid advertising, to any of its customers that did not hold trade shows (Hornick 3203–04).

273. Wagner had an advertising and promotional program which was made available to all of its customers, including all Gibson stores. The program encompassed the use of tabloids, newspaper advertising and sales floor demonstrations (Hornick 3196–97, 3201, 3229–32). The payments made by Wagner would vary, depending on the type of service utilized by the customer (Hornick 3231).

274. Wagner participated with the Gibson stores, in 1972 and 1973, in advertising in Gibson tabloids which were directed at the ultimate consumers[59] (Hornick 3171, 3174, 3176, 3254). Wagner paid $500.00, by check dated May 3, 1973, [109]to the Gibson Products Corp. for advertising in the April 1972 Gibson tabloid[60] (CX 633A–F. See also Hornick 3179–80, 3186, 3187, 3190). The tabloid payment to Gibson Products Company was not based upon a percentage of total sales (Hornick 3198). Moreover, it was in addition to the show fee payments made in 1973 (Hornick 3200, 3232).

There is no showing that Wagner's tabloid payments were not within the scope of its cooperative advertising and promotional program made available to all of its customers (Finding 274). A discrimination cognizable under Count I of the complaint with respect to tabloid payments has not been proven.

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[59] Wagner believed that participation in the Gibson tabloid advertisements would facilitate sales to Gibson retail stores (Hornick 3255, 3265).

[60] The products advertised were the following model carpet sweepers: Tidy-Up, Handy, Un-Litter Bug and Sweep-A-Smile (CX 633F).

275. Wagner participated in Gibson store directory advertising in which Wagner's name and products, along with other vendors, were listed for purposes of distribution to the Gibson retail stores (Hornick 3171–72, 3228–29). Wagner paid $50.00, by check dated September 21, 1972, to the Gibson Products Company for advertising in the January-June 1973 Gibson store directory (CX 631A–E). Wagner viewed the store directory advertisement as an aid in making sales to the Gibson retail stores (Hornick 3228).

276. Wagner considered its carpet sweepers as one product line. However, there were four basic types of chassis for the carpet sweepers (Hornick 3159). There were three basic sizes. Other variations included still larger units, a unit with a dial and a larger unit with a dial and a bigger bumper (Hornick 3163–64, 3225). Even where the only variations were that of color and name, such a carpet sweeper would have its own part number (Hornick 3223).

Aladdin was the smallest carpet sweeper in size, with the least number of features; it would come in different colors and have different names, such as Aladdin Sunset Red or Aladdin Avocado Handy (Hornick 3159–60. See *e.g.*, CX 640A, B). Floormaster was another chassis type; it also came in different colors with different names, such as Floormaster Bittersweet, Floormaster Lettuce Green, Floormaster Bright Yellow, or Floormaster Brown (Hornick 3161. See, *e.g.*, CX 640A, D). The Lite N Easy Blue Mist, Aladdin, Dial A Sweep, Calico Daisies, Tidy Up and Whisk Up models were all the same type carpet sweeper, differing only in terms of color and name (Hornick 3161–62. See, *e.g.*, CX 640A, E).

Wagner also offered and sold a promotional carpet sweeper, which was specially priced at a lower price to move well. This promotional product, described only as "Carpet Sweeper A" on some of Wagner's invoices (CX 640J, L), is the [110]same type carpet sweeper as the Lite N Easy Blue Mist, Aladdin, et al. (Hornick 3162–63); for instance, the Light N Easy Blue Mist and the promotional "Carpet Sweeper A" have the same part numbers (CX 640E–N). This promotional carpet sweeper is the product sold in the case of the invoices numbered CX 640E–N.

277. The invoices in the record disclose the following contemporaneous transactions involving sales of goods of like grade and quality (CX 640A–N).

San Antonio, Texas: Aladdin/Lite N Easy Blue Mist/Carpet Sweeper A (Gibson - 3/30/73, 8/29/73; White Stores[61] - 2/6/73, 3/14/73, 5/18/73, 6/13/73, 8/20/73, 4/25/73, 12/5/73, 3/8/74).

H. Farber Brothers

278. Farber Brothers ("Farber"), of Memphis, Tennessee, sells interior automotive products, including seat covers, slip covers and air cooled cushions (Farber, 1104–05).

Farber normally sends all of its shipments out of Memphis (Farber 1105–06), including sales to Gibson stores located outside of Tennessee (CX 1204A–J). Farber is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such sales, are in the course of such commerce.

279. Farber has had employees who worked on a commission basis as well as direct sales representatives (Farber 1143–44). Sales representatives normally received a five percent commission (Farber 1145).

280. Farber's major accounts are Montgomery Ward, Western Auto, TG & Y, Gibson stores and White's (Farber 1105, 1107).

281. Farber has participated in the Gibson Trade Show from its inception (Farber 1112–13, 1118–19). Its purpose in participating in the Gibson Trade Show was to obtain more sales from retailers attending the show (Farber 1142).

282. Farber usually has two to three of its employees attending the Gibson Trade Show. These employees are responsible for displaying merchandise to Gibson store buyers, presenting them with show sheets and taking their orders (Farber 1118). [111]

Farber has paid for the expenses incurred by its employees while attending the show (CX 1180, 1181A–D, 1182A–B, 1183A–D, 1174A–D, 1175A–C, 1176A–B, 1178, 1179, 1170A–B, 1171A–B, 1172, 1173, 1163, 1164, 1165; Farber 1117, 1122–23, 1126, 1129, 1132, 1139).

283. Farber listed the merchandise that it would exhibit at the Gibson Trade Show on show sheets (Farber 1164). This supplier suggested the items to be listed, and H.R. Gibson, Sr. and Bobby Regeon selected those products that they believed would sell to the buyers at the trade show (Farber 1164–65, 1183–84). Farber considered the trade show buyer to be a "merchandise selector" (Farber 1165). Regeon did not actually purchase any merchandise but "would select the products that he considered worthwhile to go to the shows, to the Gibson stores" (Farber 1182, 1184).

284. The requirements placed upon Farber to participate in the Gibson Trade Show were: payment for the rental of booth space; and,

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[61] White Stores function at the retail level of operations (Finding 369).

beginning in 1973, payment of a two percent rebate to H.R. Gibson, Sr., doing business as the Gibson Trade Show, based on total annual sales to Gibson stores (Farber 1119, 1132–36, 1147–48; CX 1084, 1085, 1157A–B). [112]

285. Farber made the following booth fee payments tc the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Aug. 16-22, 1969	3		$675.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1127, 1104A
Nov. 3-7, 1969	2		500.00	Check	"	CX 1126, 1103A
Feb. 14-18, 1970	1		250.00	Check	Ideal Travel Agency	CX 1125, 1102A
May 4-8, 1970	1		250.00	Check	"	CX 1124, 1101A
Aug. 17-21, 1970	2		500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1123, 1100A
Aug. 16-20, 1971	1		275.00	Check	Ideal Travel Agency	CX 1121, 1097A
Nov. 1-5, 1971	2		550.00	Check	"	CX 1122, 1096A
Aug. 14-18, 1972	1		350.00	Check	"	CX 1118; Farber 1129
Feb. 10-14, 1973	1		350.00	Check	H.R. Gibson	CX 1116, 1095; Farber 1132
May 14-18, 1973	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1115, 1094; Farber 1132
Aug. 13-17, 1973	1		350.00	Check	"	CX 1114, 1093A; Farber 1132
Nov. 5-9, 1973	3		1,050.00	Check	H.R. Gibson, Sr.	CX 1113, 1092; Farber 1132
Feb. 8-12, 1975	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1108, 1088; Farber 1138
May 12-16, 1975	1		350.00	Check	H.R. Gibson, Sr.	CX 1107, 1087; Farber 1138
Aug. 4-8, 1975	1		350.00	Check	H.R. Gibson, Sr. 1266 E. Ledbetter Dr. Dallas, Texas	CX 1106, 1086A; Farber 1138

[113]286. On November 1, 1973, after discussions with H. R. Gibson, Sr., Farber signed an agreement to pay to the Gibson Trade Show "2% of all sales made at this show and on all sales made as a result of Supplier being represented by THE GIBSON TRADE SHOW" (CX 1084, 1157A–B; Farber 1132–35). This agreement covered 1974 (Farber 1141). Farber signed an agreement on January 2, 1975, containing the same provisions as the above agreement (CX 1085). This agreement covered 1975 (Farber 1140).

The two percent fee arrangement based on sales to Gibson stores was intended to be for H.R. Gibson, Sr.'s services in bringing customers to Farber's booth at the trade show (Farber 1133–34, 1193; CX 1157A). The services that Farber received from H.R. Gibson, Sr. included preselecting merchandise to put in the show, distributing show sheets to retailers, bringing Gibson store buyers to the trade show, encouraging them to buy merchandise and calling delinquent accounts on behalf of Farber (Farber 1142, 1193–96, 1207–08).

287. Farber regarded H.R. Gibson, Sr. as its manufacturer's representative, albeit not as an exclusive manufacturer's representa-

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* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

tive, since 1973, the time at which Farber began making two percent volume rebates to the Gibson Trade Show (Farber 1176–78). However, Farber paid its direct sales force their percentage commission and paid H.R. Gibson, Sr. his two percent volume rebate, all on the same sales (Farber 1211).

288. The two percent payments to the Gibson Trade Show are carried on Farber's books as a sales expense (Farber 1167). [114]

289. Farber made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment	
$4,000.00	1/22/75	Check	Gibson Products Co.	2%	1974	2% of dollar volume for 1974	CX 1155A-D; Farber 1148-50
7,948.02	1/23/75	Memo Billing (no charge)	Mr. H.R. Gibson, Sr. Gibson Products Co. 319 Gibson St. Seagoville, Texas	2%	1974	2% of dollar volume for 1974	CX 1155E, 1156A-D, Farber 1148-50
3,059.33	6/13/75	Check	H.R. Gibson, Sr.	2%	2nd quarter 1975	Show expense - 2% of $152,976.55 quarterly sales	CX 1156A-B; Farber 1159B
2,496.67	7/15/75	Check	Gibson Trade Show	2%	Not known	Not known	CX 1152; Farber 1163
3,155.30	10/8/75	Check	The Gibson Trade Show	2%	July, Aug., Sept. 1975	2% trade show fee as per contract	CX 1151A-B

[115]290. The show fee was paid in connection with the original sale of Farber's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Farber's products to consumers (Findings 68, 73, 97, 281, 284, 286).

291. Similarly, the booth fee was paid in order to enable Farber to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Farber's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Farber's products to consumers (Findings 64, 68, 73, 95, 281, 284).

292. Farber did not make any percentage payments to any other customer during the time period, beginning in 1973, in which it made two percent payments to the Gibson Trade Show (Farber 1167).

293. The Gibson Buyers Guide is a show directory that lists the trade show exhibitors and indicates their location at the show (Farber 1167–68). There were no requirements for any payments in order to be listed; however, if an exhibitor wished to place an advertisement in the directory, a payment was required (Farber 1168). Advertisements in the Buyers Guide were directed at buyers for the retail stores and did not constitute advertising to consumers (Farber 1194–95). [116]

294. Farber made the following payments to the Gibson Trade Show for advertisements in the show directory:

Amount	Date of Payment	Payee	Description of Payment	
$30.00	1/18/72	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	Ad in January 1972 store directory	CX 1161
17.00	2/29/72	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	Page ad in February Gibson Trade Show Buyers Guide	CX 1162A-B
17.00	5/7/73	The Gibson Trade Show 517 Gibson St. Seagoville, Texas	Page ad in May Gibson Trade Show Buyers Guide	CX 1160A-B

[117]295. Farber has continued its participation in the Gibson Trade Show in 1976 and 1977. In those years, it paid booth rental fees and a two percent volume rebate (Farber 1170–71).

296. Farber has never offered nor operated a standard advertising program (Farber 1168). However, during the period 1969 through 1975, Farber did offer to make advertising allowances available on the same basis to its customers, such as Gibson stores, TG & Y, Wal-Mart and Woolco (Farber 1203–05, 1212–13; CX 1203A–B; Pettit 4195–96, 4199). According to Farber, it offers advertising payments "the same to all customers" (Farber 1204).

Farber participated in placing advertisements in the Gibson tabloid, including an advertisement authorized on February 6, 1970, for which Farber agreed to pay Gibson Products Company $500.00 (CX 1158D; Farber 1213–14).

Farber, which did not conduct a standard advertising program, nevertheless claimed that advertising allowances were offered on the same basis to all customers. Such ambiguous evidence affords no basis for a finding that the tabloid payments constituted a cognizable discrimination under Count I of the complaint. In any event, complaint counsel have not sustained their burden of proof regarding a showing that the tabloid payments discriminated between Gibson stores and other customers competing in the products featured in such advertisements. The tabloid payment in question was made by Farber in 1970. The tabulations and other evidence in the record with respect to goods purchased by Farber's customers covers the period 1972 to 1975 (CX 1204A–B). There is no record evidence as to any sales transactions in 1970.

297. Farber manufactures approximately 14 to 15 different grades

of vinyl slip covers in order to meet consumer preferences (Farber 1202). It also manufactures about 14 to 15 different grades of cushions and ventilated or cooled cushions (Farber 1203).

298. The tabulations of purchases from Farber by Gibson stores and other customers generally give only descriptions such as "cushions" or "slip covers" (CX 1204A–B). This is insufficient to sustain a finding that such transactions involved sales of goods of like grade and quality. The following contemporaneous sales were recorded with more precision and meet the like grade and quality requirements (CX 1204A–B): [118]

Fayetteville, Ark. - carpet roll (Gibson 3/11/74; Wal-Mart[61a] - 1/4/74).

Shreveport, La. - nylon cushion (Gibson - 3/14/75 and 6/24/75; TG & Y[61a] - 1/14/75).

Abilene, Tex. - truck vinyl (Gibson - 3/14/75; TG & Y - 3/11/75).

I. Armstrong Environmental Industries

299. Armstrong Environmental Industries ("Armstrong"), of Los Angeles, California, manufactures both aboveground and underground home sprinklers (Fox 3046–47).

Armstrong sells its products throughout the United States, including sales to Gibson stores located outside of California (Fox 3046, 3050–51). Armstrong's products are shipped from California and Florida (Fox 3080). Armstrong is engaged in interstate commerce and its transactions with respondents, including show fee payments based on such sales, are in the course of such commerce.

300. Armstrong sells to distributors, chain retail establishments, retail stores and catalog houses (Fox 3048). Armstrong's retail customers in 1969 included J. C. Penney, Montgomery Ward, Oklahoma Tire, White Stores, Leonards, Angels, Builders Emporium, Gamble-Skogmo, H.B. Meyers, K-Mart, Handy Dan and Gibson stores (Fox 3048–50).

The Gibson stores, collectively, were Armstrong's eighth or ninth largest customer (Fox 3055, 3093). Armstrong did a total volume of net sales with all Gibson stores of $28,000.00 for the business year ending June 24, 1970 (CX 781B; Fox 3068–69).

301. Individual franchisees using the Gibson name placed orders with Armstrong. The franchisees were billed on an individual basis (Fox 3094).

302. Armstrong's sales force consists solely of manufacturer's

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[61a] Wal-Mart and TG & Y function at the retail level of operations (Finding 309).

representatives located throughout the country (Fox 3046–47). The manufacturer's representatives are compensated on the basis of the gross sales they make on behalf of Armstrong (Fox 3059–60). They call on customers, solicit business and take orders (Fox 3061). The F.F. Tranchina Company ("Tranchina") is Armstrong's manufacturer's representative in Texas; it helped Armstrong begin selling to Gibson stores (Fox 3051–52). H.R. Gibson, Sr. was never Armstrong's manufacturer's representative (Fox 3061). [119]

303. Armstrong participated in the Gibson Trade Show in 1969, 1970 and 1971 (Fox 3052–55). In the course of such participation, it listed the merchandise, along with the prices, that it presented for sale at the 1969, 1970 and 1971 Gibson Trade Shows on the show sheets provided by the Gibson Trade Show. The show sheets served as purchase order forms (Fox 3065–66; CX 778A–F, 779, 780A–F, 784A–G). Armstrong participated in the Gibson Trade Show because it facilitated its sales to retailers (Fox 3091). And, the services provided by the Gibson Trade Show such as show sheets, show directories and the introduction of customers to Armstrong representatives by trade show personnel also facilitated such sales to retailers (Fox 3091–92).

304. The only requirement imposed upon Armstrong by the Gibson Trade Show for Armstrong to be in the 1969 show was payment for the rental of booth space (Fox 3053). In 1970 and 1971, Armstrong was required to pay rental for booth space and a five percent fee on total annual gross sales to all Gibson stores in 1969 and 1970, respectively, in order to participate in the Gibson Trade Show (Fox 3053–55, 3077–78, 3100). [120]

305. Armstrong made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Nov. 1970			$175.00	Check	F.F. Tranchina Co. Inc.**	CX 782A-B
Nov. 1-5, 1971			$275.00	Check	F.F. Tranchina Co. Inc.**	CX 788A, D

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

**/ Tranchina is Armstrong's manufacturer's representative in the area that encompasses the Gibson Trade Show (Fox 3051-52). Tranchina paid out the expenses for Armstrong's participation in the trade shows and was subsequently reimbursed (CX 782A; Fox 3062, 3064).

306. Armstrong made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment on Armstrong Records	
$1,390.50	10/21/70	Check	Gibson Products Co. Seagoville, Texas	5%	Business year ending June 24, 1970	5% of net sales for past season	CX 781A-C; Fox 3068-69
$2,636.55	10/23/71	Check	Gibson Products Co.	5%	October 15, 1970 - October 15, 1971	5% rebate of total net sales of $52,730.96 for 10/15/70 through 10/15/71	CX 785A-C

[122]307. Armstrong paid the Gibson Trade Show five percent of gross sales to all Gibson stores in the year prior to the trade show because, "[i]f we [Armstrong] hadn't paid the five percent for the prior years' gross sales, we would not be invited to the next Gibson show" (Fox 3077). The show fee had nothing to do with promoting or advertising goods for resale at the retail level (Fox 3093).

308. The show fee was paid in connection with the original sale of Armstrong's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Armstrong's products to consumers (Findings 68, 73, 97, 303, 304, 307).

309. Similarly, the booth fee was paid in order to enable Armstrong to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Armstrong's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Armstrong's products to consumers (Findings 64, 68, 73, 95, 303, 304).

310. In the period 1969 through 1971, Armstrong neither made nor offered to make any payments based on a percentage of total sales to any of its customers, other than the five percent paid to Gibson to participate in the Gibson Trade Show (Fox 3058).

During the period 1969 through 1971, Armstrong neither paid nor offered to pay any percentage fee based on total sales to any of the other trade shows that it attended (Fox 3055–57).

311. During the period 1969 through 1971, Armstrong neither made nor offered to make an alternate payment equal to the cost of the booth fee to any of its customers that did not hold a trade show (Fox 3057).

312. During the period 1969 through 1971, Armstrong offered to all of its customers, including Gibson stores, an advertising allowance with proof of advertising of five percent of gross sales (Fox 3059). This advertising allowance is to be distinguished from the five percent show fee paid to the Gibson Trade Show (Fox 3074–75, 3092–93). The five percent show fee paid to participate in the Gibson Trade Show was in addition to the five percent cooperative advertising allowance also made available to Gibson retail stores (Fox 3075).

In 1970, Armstrong had an industry-wide promotional program consisting of a sprinkler display unit, which it offered to all of its customers (Fox 3054). [123]

313. During the period 1969 through 1971, excluding the show fee payment to the Gibson Trade Show and its five percent cooperative advertising program, Armstrong neither offered to pay nor made available to any customer a percentage payment based on total sales or an alternate payment for promotional services rendered (Fox 3076–77).

314. Armstrong manufactures 53 different types of sprinkler devices, which fall into two basic product lines. One line consists of above ground sprinklers and includes impulse sprinklers, oscillating sprinklers and spike sprinklers. The other line consists of underground products and includes pop-up sprinklers, flathead sprinklers and bubblers (Fox 3047–48).

315. Armstrong's customers, including Gibson stores, selectively purchased certain items from among the different types of sprinklers in Armstrong's two sprinkler lines (Fox 3096, 3105–06).

316. The record contains no documentary evidence bearing on the question of whether Gibson stores and other Armstrong customers competing with them in the resale of Armstrong products purchased goods of like grade and quality in the relevant period.

J. Unitron

317. Unitron, of Hawthorne, California, imports and distributes home improvement and do-it-yourself merchandise, including mahogany shelving, roll-up blinds, interior decorative products, filigreed grilles, framing, beads, window shades, folding floor screens, casters, miscellaneous hardware, louvered doors, window shutters, mahogany stools and rattan chairs (Kern 2795–96).

Unitron warehouses its products in California, Texas, Florida, New York and Illinois (Kern 2796).

Unitron sells and ships its products throughout the United States, including sales to Gibson stores located outside of the above states (CX 835A–M; Kern 2796). Unitron is engaged in interstate commerce and its transactions with respondents, including show fee payments based on such sales, are in the course of such commerce. [124]

318. Unitron sells to both retailers and distributors (Kern 2870). During the period 1969 through 1972, some of Unitron's customers were Sears Roebuck, J.C. Penney, Montgomery Ward, Acme Quality Paint, Gibson Discount Stores, Gulf Mart Stores, Handy Dan, Angels Home Centers, Baldridge Lumber Company, Oklahoma Candy, Saxon Paint Company, Fred Meyer and Thrifty Drug Stores (Kern 2799–2800).

In 1969, the Gibson group of stores constituted one of Unitron's ten largest customers, making up about ten percent of its business (Kern

2822). Unitron's total net sales to all Gibson stores in 1969 was $107,089.50 (CX 816; Kern 2848-49).

319. Unitron personnel and manufacturer's representatives were utilized in soliciting and servicing customer accounts (Kern 2797-98). Manufacturer's representatives were employed on a commission basis, receiving between three and ten percent commission depending upon the product sold (Kern 2798). In the period 1969 through 1972, Unitron's manufacturer's representative in the Southwest was Bill Blair and Associates (Kern 2797).

320. Unitron participated in four Gibson Trade Shows per year in the period 1969 to 1972 (Kern 2823).

321. Unitron personnel as well as its manufacturer's representative in the area, Bill Blair and Associates, attended the trade shows and staffed Unitron's booths at the shows (Kern 2824, 2884).

322. Unitron never made sales to customers other than Gibson stores while at the Gibson Trade Show. The show was open only to exhibitors, Gibson employees, Gibson store personnel and other persons whose admission was authorized (Kern 2824-25).

323. Attendance at the Gibson Trade Show by a Gibson franchisee did not guarantee purchases from Unitron. For example, Pamida, a group with a large number of franchised stores, did not purchase from the supplier (Kern 2896-97).

324. Gibson franchisees placed their orders individually with Unitron on their own order forms imprinted with the Gibson name (Kern 2884, 2893-94, 2898). Where an organization such as West and Company operated stores under its own name as well as under one of the Gibson trade names, Unitron could only sell to the group's Gibson franchise stores at the Gibson Trade Show (Kern 2895-96). [125]

Although individual franchisees were responsible for paying their bills, Unitron customarily contacted H.R. Gibson, Sr. or the Gibson accounts payable staff at the Seagoville headquarters office to provide assistance in resolving delinquent franchisee accounts (Kern 2898-99, 2966; SR 23J).

325. In 1969, the requirements for Unitron's participation in the Gibson Trade Show were: payment of booth fees; and, payment of special allowances on sales volume (Kern 2804-05). [126]

326. Unitron made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Spring 1969	2		$370.00	Check		CX 810; Kern 2835
February 1970	2		$500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 817, 818
May 1970	2		$500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 819A-B
August 1970			$500.00	Check	Ideal Travel Agency	CX 820A-B
November 1970			$750.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 821A-B
November 1971	2		$550.00	Check	Ideal Travel Agency	CX 824, 826
[Date of payment: 4/13/72]			$600.00	Check	Ideal Travel Agency	CX 829; Kern 2838-39
May 1972			$350.00	Check	Ideal Travel Agency	CX 830A-B
November 1972	2		$700.00	Check	Ideal Travel Agency	CX 831A-B

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

[127]327. In 1968, Bobby Regeon traveled to California in response to Unitron's invitation to see its new mobile showroom which it wanted to use in the Gibson Trade Show. Regeon requested a five percent special compensation on the total gross volume done with all Gibson stores[62] (Kern 2805–08).

Unitron discussed the special allowance with Regeon in light of its desires to develop its business relationship with Gibson Discount stores and obtain Gibson assistance in promoting the advertisement and sale of Unitron products (Kern 2806–07). Subsequently, Unitron agreed to make payments, beginning in 1969, based on two and one-half percent of adjusted gross sales[63] to all Gibson stores[64] (Kern 2808).

Unitron made the payments of two and one-half percent of adjusted gross sales to the Gibson Trade Show because it was promised promotions, advertising, special marketing assistance, generation of greater sales volume, choice of prime booth space at the trade shows and "a trouble-free relationship between Gibson and Unitron"[65] (Kern

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[62] Sidney Kern, Unitron's executive vice president between 1969 and 1972 (Kern 2794–95), testified: "In order to be assured of booth space in a prime location, there was the requirement that we [Unitron] participate in the payment of special allowances on volume" (Kern 2806).

[63] Adjusted gross sales refers to gross sales less any sales discounts that appeared on the invoice (Kern 2808).

[64] The two and one-half percent payments, which were above and beyond normal discounts and allowances, did not go to Gibson retail stores; consequently, these payments did not appear on the face of the invoices (Kern 2965, 2972).

[65] In fact, Unitron's Sidney Kern had a telephone conversation with H.R. Gibson, Sr., in 1971 or early 1972, in which Gibson, Sr. complained that Unitron's regular prices on its shelving products were too high. Kern testified that:

(Continued)

2817, 2858–59, 2861–63, [128]2908–10). Discussions with Gibson personnel, such as Bobby Regeon, had indicated that Unitron would be afforded tabloid advertising if the two and one-half percent allowance were paid (Kern 2841–42, 2844–45, 2906–07, 2908–09; CX 812, 822). Unitron wanted tabloid advertising since this would force the Gibson stores to stock the items advertised to the public (Kern 2845–46, 2906–07). Although Unitron expected the show fee percentage payments to generate advertising at the retail level,[66] these expectations were never realized. No tabloids featuring Unitron's products were issued (Kern 2914–15, 2840; CX 822).

Effective January 1, 1972, Unitron and Gibson Products Company agreed to Unitron making payments on two, rather than two and one-half, percent of adjusted gross sales to all Gibson stores (CX 827A–B; Kern 2851–53).

Unitron believed that if it had not made the percentage payments to Gibson Products Company, it would not have been allowed to participate in the Gibson Trade Show (Kern 2857). [129]

328. Unitron made the following show fee payments to the Gibson Trade Show:*

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment	
$ 877.42	7/3/69	Check		2 1/2%	Second quarter of 1969	Allowance of 2 1/2% on the second quarter sales to Gibson stores as per agreement	CX 812
$1,029.32	12/26/72	Check	Gibson Products Co. 319 Gibson St. Seagoville, Texas	2%	January-September 1972	Payment of the rebate commissions	CX 83X Kern 2855-56 2913
$ 392.33				2%	January-March 1972	2% of sales to Gibson Products for Jan. - March 1972	CX 828;

*/ Unitron's Sidney Kern testified that Unitron paid a percentage show fee to the Gibson Trade Show in each of the years during the 1969 to 1972 period; however, the only record documentation of actual show fee payments is as indicated on this chart - thus, there is no record proof of any payments for the years 1970 or 1971 (Kern 2914-20).

Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

[130]329. The show fee was paid in connection with the original sale of Unitron's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Unitron's products to consumers (Findings 68, 73, 97, 325, 327).

330. Similarly, the booth fee was paid in order to enable Unitron to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Unitron's goods to Gibson retail stores. The booth fee was not a

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. . . I recalled to him that we were part of his rebate team, so to speak, and that suffered the end to any other questions on his part, any other problems, and that was the end of it, and we continued offering the product at the same pricing and without any other additional difficulties (Kern 2859. See also Kern 2858–59, 2861–63).

[66] Consistent with this, Unitron did not expect its payment of booth fees to generate any advertising; the booth fees were paid for the rental of space used to participate in the Gibson Trade Shows (Kern 2914).

promotional allowance made in connection with the resale of Unitron's products to consumers (Findings 64, 68, 73, 95, 325, 327 n. 66).

331. During the 1969 to 1972 period, Unitron did not make available to all of its customers either a percentage payment based on adjusted gross sales or an alternate payment for promotional services rendered (Kern 2811, 2863–64).

332. In regard to the booth fee payments that Unitron made at all the trade shows it attended, Unitron did not make available alternate payments to those customers that did not conduct a trade show (Kern 2833–34).

333. In this period, however, Unitron paid Thrifty Drug Stores and Fred Meyer one and one-half percent of adjusted gross sales and one percent of adjusted gross sales, respectively. These were not standard allowances available to all customers; they were made because of the sales volume of these powerful buyers coupled, in the case of Thrifty, with a threat to discontinue doing business if the discount were not paid (Kern 2811–12, 2816–17, 2957–58).

334. Unitron made available to all of its customers, including Gibson stores, a standard promotional program, which consisted of a ten percent discount[67] given to any customer merely for the asking. The discount was variously designated as a sales promotion, advertising allowance or freight allowance, depending on what use the customer applied it to (Kern 2808–10, 2966). The show fee payment to Gibson, Sr. was over and above that program.

335. On occasion, Unitron dealt directly with Gibson franchisees in regard to advertising Unitron products to consumers (Kern 2903–04; SR 23–0). Unitron did not make or offer to make any payments to compensate individual Gibson retail stores that chose to advertise Unitron products (Kern 2905–06). [131]

336. There is wide variation in Unitron's product lines. It sells about 10 or 12 different kinds of mats, including the Cecil mat and the Diamond Weave mat (Kern 2942). There are different styles of chairs, including Luan mahogany stools in four different sizes and two or three different types of rattan chairs (Kern 2943, 2945–46). Unitron's interior decorative items include grillwork of Luan mahogany, frames of Luan mahogany, plungers that go with the frame sets, different sizes of grills, different sizes of frames, and decorative bead curtains for draperies, for short curtains and for long curtains (Kern 2943–44). It sells two types of shutters in different sizes, made of Luan mahogany and beechwood (Kern 2944). Unitron's decorative folding screens come in a variety of different designs, different materials and

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[67] This ten percent allowance would normally appear on the face of an invoice (Kern 2966).

different styles (Kern 2944–45). Its bamboo blinds and plastic blinds also come in different sizes and styles (Kern 2947).

337. The tabulations in the record, summarizing Unitron sales in 1970 and 1971, show the following contemporaneous transactions which involve sales of goods of like grade and quality[68] to competing customers (CX 835A–M):[69]

San Antonio, Texas: Deluxe Mahogany Shelves (Gibson - 9/8/70, 4/30/71, 8/13/71; Handy Dan Hardware[70] - 3/2/70, 4/14/70, 7/20/70, 8/21/70, 11/25/70, 12/1/70, 12/4/70, 12/29/70, 1/12/71, 3/2/71, 3/25/71, 3/26/71, 5/17/71, 5/18/71, 7/19/71, 8/12/71, 8/17/71, 8/23/71, 8/30/71, 10/7/71, 10/11/71, 10/15/71, 10/21/71, 11/4/71, 11/5/71, 11/19/71, 12/1/71, 12/6/71); [132]Milk Stools (Gibson - 8/26/70, 9/8/70, 9/28/70; Handy Dan Hardware - 2/13/70); Bookcase Kit (Gibson - 9/8/70; Handy Dan Hardware - 2/13/70, 5/14/70, 11/25/70, 12/1/70); Louver Door (Gibson - 9/8/70; Handy Dan Hardware - 12/1/70); Cork Panels (Gibson - 6/24/71, 8/3/71; Handy Dan Hardware - 8/17/71, 9/22/71, 10/15/71); Swivel Casters (Gibson - 5/20/71; Handy Dan Hardware - 1/22/71, 9/29/71); Oval Blinds (Gibson - 6/4/71, 6/24/71, 8/3/71; Handy Dan Hardware - 1/21/71, 10/7/71).

This is the only documentary evidence concerning such sales. As already noted, booth fees were paid in 1969, 1970, 1971 and 1972. However, there is no documentary evidence of show fee payments in 1970–1971, and some doubt whether they were paid in those years.[71] Under the circumstances, there has been a failure to document sales of goods of like grade and quality to Gibson stores in the relevant period with respect to show fee payments.

K. Comfort Products, Inc.

338. Comfort Products, Inc. ("Comfort"),[72] of Memphis, Tennessee, manufactures and sells ventilated cushions and slip-on seat covers (F. Miller 500–01). In the past, Comfort has manufactured and sold electronic equipment such as radios, CB's and stereos (F. Miller 502).

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[68] For each of the products listed, there is no evidence of variations going to like grade and quality, such as differences in size, style or type of material used.

[69] The tabulations show other contemporaneous transactions. However, in the majority of those sales, there is no record evidence of the functional level that the customer was operating at. Thus, it is not possible to determine whether the customer was competing with Gibson retail stores in the resale of Unitron's merchandise. Moreover, there is no record evidence that these transactions involve goods of like grade and quality. For instance, the tabulations describe some products only as "mats," "stools," "doors," "grills," "fences" and "casters," despite the fact that these products come in different sizes and styles along with other possible variations (Finding 336).

[70] Handy Dan Hardware functions at the retail level of operations (Finding 369).

[71] The record is unclear. It shows booth fee payments in 1970 to 1971 (Finding 326), and Mr. Kern testified that show fee payments were made in those years (Kern 2920). Nevertheless, the documentary evidence pertaining to show fee payments relates only to 1969 and 1972 with no explanation why records of show fee payments for 1970 and 1971 were not secured, if they had, in fact, been made. In view of this ambiguity in the record, no confident finding can be made that Unitron made show fee payments in 1970 and 1971.

[72] Comfort is an affiliate of a company called Arthur Fulmer (Miller 501).

Comfort's manufacturing plant is located in Olive Branch, Mississippi (F. Miller 503). [133]

Comfort ships its products from its Mississippi plant to various customers (F. Miller 503), including shipments to Gibson stores located outside of Mississippi (CX 909F–H). Comfort is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

339. Some of Comfort's major accounts are Fed-Mart, Pep Boys, Advance Stores and Gibsons (F. Miller 502–03).

340. Comfort employs manufacturer's representatives who act as the company's sales agents. These representatives usually receive a five to six percent commission (F. Miller 523–24).

341. Comfort participated in the Gibson Trade Show because it thought the show would increase its sales by performing certain services (F. Miller 504–05, 593, 602–03). Comfort's primary purpose in attending a trade show such as the Gibson Trade Show is to sell its products to retailers (F. Miller 603).

342. Comfort considered the Gibson Trade Show to represent it at the trade show with respect to the sale of merchandise (F. Miller 523). However, Comfort personnel staffed its booth and took orders at the Gibson Trade Show (F. Miller 512, 557). Comfort also had a sales representative in the Dallas area who attended the trade show and received the regular commission on sales made at the show; this sales commission was in addition to the show fee percentage payments made to the Gibson Trade Show (F. Miller 557–58).

343. Comfort and Bobby Regeon, who the supplier knew as the buyer for Gibson Products Company (F. Miller 558–59, 582–83), together decided what merchandise would be listed on the show sheets and, thus, the products to be offered for sale at the trade show (CX 848C–H, 854B–C, 855D–J; F. Miller 535–36, 541). The show sheets are made available to buyers at the trade show, and are generally the only forms used in writing orders for buyers that visit Comfort's booth (F. Miller 536–37, 541–42).

344. The requirements for Comfort's participation in the Gibson Trade Shows were: payment of a booth fee; and, show fee payments based on a percentage of sales volume (F. Miller 505, 516, 549–50, 553–54; CX 855C, 899A–B). [134]

345. Comfort made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
February 12-17, 1972	1		$275.00	Check	Smokey Hale Sales** 7616 LBJ Freeway Dallas, Texas	CX 844A-C; Miller 507
November 6-10, 1972	1		$350.00			CX 847A, C-D
February 10-14, 1973***						CX 853B; Miller

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

**/ Smokey Hale Sales, Comfort's representative in Dallas, paid the booth fees for Comfort and was subsequently reimbursed (Miller 507).

***/ CX 853B, the contract governing Comfort's participation in the February 10-14, 1973 Gibson Trade Show, shows that $1,400.00 in booth fees were to be paid to the Gibson Trade Show by Keller-Hyden, Comfort's sales representative. However, Keller-Hyden was also representing two other companies who, presumably, occupied at least two, and perhaps three, of the booths indicated on the contract. Thus, the record does not show what portion of this $1,400.00 was paid by Comfort iller 539-40; CX 853B).

[135] 346. On December 21, 1972, Comfort, with Keller-Hyden representing it,[73] agreed "that in consideration of the services rendered by THE TRADE SHOW that it will pay to THE GIBSON TRADE SHOW two percent of all sales made by Supplier at the TRADE SHOW and on all sales made as a result of Supplier being represented by THE TRADE SHOW" (CX 855C; F. Miller 518-19, 527).

Comfort viewed the agreement to pay two percent of all sales to the Gibson Trade Show as "[a] fee for services rendered . . . at the trade show" (F. Miller 521-22; CX 855C).

The two percent trade show fee in 1973 was to be paid on sales of manufactured products, *i.e.*, ventilated cushions and seat covers. A three percent trade show fee in 1973 was to be paid on sales of stereos (CX 862B, C, 874C; F. Miller 533-34, 543). In 1974, Comfort agreed to an increase in its percentage payment based on sales resulting from the Gibson Trade Show from two percent to three percent for manufactured products, such as ventilated cushions and seat covers, and from three percent to four percent for stereos (F. Miller 549-50, 553-54; CX 899A-B, 876C, 877B).

347. The services that Comfort expected to receive and did receive from the Gibson Trade Show included getting many Gibson store buyers together in one place, help of the trade show operators in bringing customers to Comfort's booth and help in explaining Comfort's products and programs (F. Miller 522, 593, 602-03). Comfort did not expect the show fee to be used in connection with advertising at

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[73] Keller-Hyden served as Comfort's sales representative (F. Miller 540).

the retail level or otherwise with promoting the resale of Comfort products[74] (F. Miller 591–93). [136]

348. Comfort made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Comfort Records	
$ 3,218.42	7/20/73	Check	Gibson Products	3%-Stereos 2%-Mfg. prod.*	First half of 1973	Rebate on merchandise purchased from December 1972 through June 1973	CX 862A-F
6,263.71	1/9/74	Credit Memo	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3%-Stereos 2%-Mfg. prod.*	Second half of 1973	Special allowance on purchases - July through Dec. 1973	CX 874A-C
11,034.33	8/7/74	Credit Memo	"	4%-Stereos 3%-Mfg. prod.*	First half of 1974	Special allowance on purchases - Jan. through June 1974	CX 878A-C
6,208.69	1/13/75	Credit Memo	"	4%-Stereos 3%-Mfg. prod.*	Second half of 1974	Special allowance on purchases - July through Dec. 1974	CX 876A-C

*/ The manufactured products consist almost exclusively of ventilated cushions and seat covers (Miller 332-33).

[137]349. The show fee was paid in connection with the original sale of Comfort's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Comfort's products to consumers (Findings 68, 73, 97, 341, 344, 347).

350. Similarly, the booth fee was paid in order to enable Comfort to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Comfort's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Comfort's products to consumers (Findings 64, 68, 73, 95, 341, 344).

351. Comfort did not make any percentage payments based on volume of purchases to anyone other than Gibson Products for the years 1972, 1973 and 1974 (F. Miller 564–65).

352. The invoices in the record disclose contemporaneous transactions involving sales of goods by Comfort to Gibson stores and other Comfort customers located in the same town or city (CX 909A–H, J, L, N, O). However, the record evidence is silent as to the functional level at which the non-Gibson customers operated. Moreover, the invoices show the sale of goods to Gibson stores that are entirely different from the goods sold to the non-Gibson customers. Thus, complaint counsel have not satisfied their burden of proof with respect to a showing that Gibson retail stores and other Comfort customers competed in the resale of Comfort products of like grade and quality.

L. Beagle Manufacturing Company

353. Beagle Manufacturing Company ("Beagle"), of El Monte, California, manufactures wrought iron, planter stands, flower arranging accessories, candle holders, baker's racks and decorative furniture, fabricates styrofoam and supplies a general line of clay products to the florist supply business (McCracken 52–53, 201).

Beagle sells its products throughout the United States, including sales to Gibson stores located outside of California (McCracken 54, 200-01). Beagle is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are made in the course of such commerce. [138]

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[74] The Comfort witness, Fred J. Miller, testified that "[n]obody ever told me what it [the trade show fee] was going to be used for" (F. Miller 592).

354. Beagle has 800 to 1,000 customers, including K-Mart, Woolworth, McCrory-McClellan, Gibson, Pacific Coast Commercial Company, Arett Sales, Motts and House of Decorative Accessories (McCracken 53-54, 200). Beagle made sales of approximately $40,000 to the Gibson stores in 1972 (McCracken 223-24).

355. Invoices for orders received from Gibson stores are sent by Beagle to the individual Gibson stores (McCracken 211-13, 230).

356. Beagle's sales force has been comprised of manufacturer's representatives from 1968 to the time of trial (McCracken 60-61). The manufacturer's representatives received a five percent commission based on what they sold and what was shipped (McCracken 61-62). In 1970, Beagle hired Dick Snow as its manufacturer's representative to cover Oklahoma and Texas[75] (McCracken 59-60, 200). Snow represents Beagle at the Gibson Trade Shows (McCracken 205). H.R. Gibson, Sr. is not Beagle's manufacturer's representative (McCracken 205).

357. Beagle began attending the Gibson Trade Show in 1970 (McCracken 64, 185-86). Beagle desired to participate in the Gibson Trade Show in order to facilitate sales to Gibson stores (McCracken 213). Prior to 1970, the first year in which Beagle was listed on the Gibson show sheets and allowed to participate in the Gibson Trade Show, Beagle was able to make only minimal sales to Gibson stores. Beginning in 1970, however, Beagle was able to sell its merchandise to Gibson stores in considerable volume (McCracken 62, 64, 220-21).

358. The requirements imposed on Beagle by the Gibson Trade Show for Beagle to attend the show were: payment for rental of booth space; acceptance by the Gibson buyer of Beagle's merchandise to be listed at the show; and, beginning in 1972, payment of a three percent fee based on total sales to all Gibson stores (McCracken 64-66, 79-81, 82, 208; SR 45B, C, D, E).

359. Beagle listed the merchandise that it would present for sale to Gibson store buyers at the Gibson Trade Show on show sheets. The show sheet forms were provided by Gibson and were to be used throughout the year by the Gibson [139]stores to order listed merchandise.[76] Beagle, through its manufacturer's representative, Dick Snow, furnished the product and price information to Gibson to put on the

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[75] Beagle also utilizes the services of another manufacturer's representative in Dallas, Claude Garrison & Associates. This representative covers the entire south for Beagle, selling to floor supply jobbers only (McCracken 206).

[76] Robert Stanton McCracken, sales manager and vice president of Beagle (McCracken 52-53), testified that "practically every order we ever got from them [the Gibson stores] was on this document [the show sheets — CX 796A-M and CX 797A-P] here" (McCracken 223, 225).

forms (McCracken 215, 219-20, 222-23, 225, 249T-Y; CX 796A-M, 797A-P). [140]

360. Beagle made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
February 1970			$250.00	Check	R.J. Snow & Associates** P.O. Box 24273 Dallas, Texas	CX 799
February 1971			$300.00	Check	Snow Associates** P. O. Box 24273 Dallas, Texas	CX 800
February 1972			$300.00	Check	R.J. Snow & Associates** P. O. Box 24273 Dallas, Texas	CX 801A-B

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

**/ Snow, Beagle's manufacturer's representative in the area that includes the Gibson Trade Show (McCracken 59-60, 200, 205), paid out the expenses for Beagle's participation in the trade show and was subsequently reimbursed (McCracken 195).

[141]361. In 1972, Beagle was advised by Tommy Perkins, acting on behalf of "the Gibson buying office," that it would have to pay five percent of total sales made to all Gibson stores in order to be listed in the Gibson Trade Show (McCracken 66, 71-72). Subsequently, Beagle and Perkins agreed that Beagle would make payments based on three percent of total sales to all Gibson stores (McCracken 79-81). The three percent payments were made, beginning in 1972, on a monthly basis, paid to Gibson Products Company[77] and sent to Tommy Perkins (McCracken 81-82, 208; SR 45B-E). Such payments have continued from 1972 to the present (McCracken 208).

Beagle made the three percent payments in order to be able to sell to the Gibson retail chain (McCracken 82). [142]

362. Beagle made the following show fee payments to the Gibson Trade Show:

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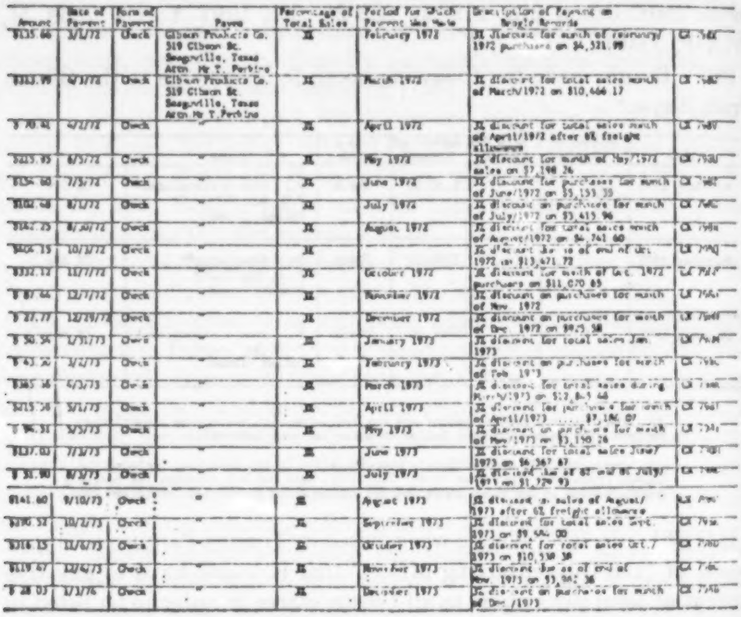
[77] Beagle made these payments, in the form of check, payable to Gibson Products Company until October 1975, after which time the checks were made payable to the Gibson Trade Show (McCracken 192, 249K, N-Q; SR 46).



Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment on Beagle Records	
$135.66	3/1/72	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn. Mr T. Perkins	3%	February 1972	3% discount for month of February/1972 purchases on $4,521.99	CX [illegible]
$313.99	4/3/72	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn Mr T. Perkins	3%	March 1972	3% discount for total sales month of March/1972 on $10,466.17	CX [illegible]
$ 70.41	4/2/72	Check	″	3%	April 1972	3% discount for total sales month of April/1972 after 6% freight allowance	CX [illegible]
$215.95	6/5/72	Check	″	3%	May 1972	3% discount for month of May/1972 sales on $7,198.26	CX [illegible]
$154.60	7/5/72	Check	″	3%	June 1972	3% discount for purchases for month of June/1972 on $5,153.35	CX [illegible]
$102.48	8/1/72	Check	″	3%	July 1972	3% discount on purchases for month of July/1972 on $3,415.96	CX [illegible]
$142.25	8/30/72	Check	″	3%	August 1972	3% discount for total sales month of August/1972 on $4,741.60	CX [illegible]
$404.15	10/3/72	Check	″	3%		3% discount due as of end of Sept. 1972 on $13,471.72	CX [illegible]
$332.12	11/7/72	Check	″	3%	October 1972	3% discount for month of Oct. 1972 purchases on $11,070.65	CX [illegible]
$ 87.44	12/7/72	Check	″	3%	November 1972	3% discount on purchases for month of Nov. 1972	CX [illegible]
$ 27.77	12/29/72	Check	″	3%	December 1972	3% discount on purchases for month of Dec. 1972 on $925.58	CX [illegible]
$ 50.56	1/31/73	Check	″	3%	January 1973	3% discount for total sales Jan. 1973	CX [illegible]
$ 43.20	3/2/73	Check	″	3%	February 1973	3% discount on purchases for month of Feb. 1973	CX [illegible]
$385.36	4/3/73	Check	″	3%	March 1973	3% discount for total sales during March/1973 on $12,845.44	CX [illegible]
$215.58	5/1/73	Check	″	3%	April 1973	3% discount for purchases for month of April/1973 ..... $7,186.07	CX [illegible]
$ 95.71	5/3/73	Check	″	3%	May 1973	3% discount on purchases for month of May/1973 on $3,190.26	CX [illegible]
$197.03	7/3/73	Check	″	3%	June 1973	3% discount for total sales June/1973 on $6,567.67	CX [illegible]
$ 31.90	8/3/73	Check	″	3%	July 1973	3% discount due as of end of July/1973 on $1,[illegible]	CX [illegible]
$141.60	9/10/73	Check	″	3%	August 1973	3% discount on sales of August/1973 after 6% freight allowance	CX [illegible]
$290.52	10/2/73	Check	″	3%	September 1973	3% discount for total sales Sept. 1973 on $9,684.00	CX [illegible]
$316.15	11/6/73	Check	″	3%	October 1973	3% discount for total sales Oct./1973 on $10,538.38	CX [illegible]
$119.67	12/4/73	Check	″	3%	November 1973	3% discount due as of end of Nov. 1973 on $3,[illegible]	CX [illegible]
$ 28.03	1/3/74	Check	″	3%	December 1973	3% discount on purchases for month of Dec./1973	CX [illegible]

[143]363. The show fee was paid in connection with the original sale of Beagle's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Beagle's products to consumers (Findings 68, 73, 97, 357, 358, 361).

364. Similarly, the booth fee was paid in order to enable Beagle to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Beagle's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Beagle's products to consumers (Findings 64, 68, 73, 95, 357, 358).

365. In 1972, Beagle neither made nor offered to make a payment based on three percent of total sales or an alternate payment to any of its other customers (McCracken 81, 82).

366. Beagle has six basic product lines, which include about 500 different products. Each of the six lines is comprised of at least 20 different items (McCracken 53, 239). Beagle's styrofoam line has about 300 products of different size, shape and form. Some of the products fabricated in the styrofoam line are eight sizes of balls ranging from one inch to 12 inches, cones, adhesive-based foam, round foam for sticking artificial flowers in, wreaths, pyramids, Easter eggs, sheets, discs and pedestals (McCracken 239).

367. Beagle's customers do not buy all of the product lines sold by Beagle (McCracken 200–01).

368. The record contains no documentary evidence bearing on the question of whether the Gibson stores and other Beagle customers competed in the resale of goods of like grade and quality. [144]

M. General Findings

369. The following firms function at the retail level of operations (Tocci 2159–60, 2168–69, 2212–15, 2361–62; Hare 2571–72, 2574–77, 2580–86, 2596; Hornick 3166; Evans 3937, 3946–49; Pettit 4093, 4108–12; Doyle 4288–89): TG & Y, K-Mart, Wal-Mart, Target, Gibson, Woolco, Roses, M.E. Moses, Wackers, J.C. Penney, Sears Roebuck, W.T. Grant, J.J. Newberry, Montgomery Ward, Western Auto Supply, Ben Franklin, Handy Dan Hardware, Ace Hardware, Cotter and Company, Wynn Stores, Duke and Ayers, H.L. Green, McCrory, Kress, Merchants' Buying Syndicate, D & J Supermarket, Parkit Market, Silver Dollar Grocery, Duggers Food Mart Inc., La Boya Grocery, Burton Dairy Way, Food Basket, Cherry's Drive-in, Sundown Food Store, Landers Little Giant, Minyard's, Luther Jenkins, West and Company,[78] Howard Brothers,[78] Abbey Sales, Surplus City, Sterling Stores, W.E. Walker, Perry Brothers, OTASCO, White Stores.

370. The agreements between suppliers and the Gibson Trade Show, governing the suppliers' participation in the trade show, contain the following provisions or provisions similar in effect:

> WHEREAS Lessor has reserved the right to sub-lease exhibition booth space in said Market Hall (during the term of said primary lease) to such persons, firms, and corporations as he may choose in his sole discretion for the purpose of exhibiting and selling goods, wares, merchandise or services to owners, operators, and managers of GIBSON DISCOUNT CENTERS which are admitted by Lessor to said GIBSON TRADE SHOW (CX 1097A).
>
> 6. All equipment furnished by Lessor herein for the construction of Lessee's booth and any additional personal equipment such as pegboards, carpets, coat racks or additional signs (which Lessee shall order at its own expense), shall be obtained from Freeman Decorating Company, 1300 Wycliff Ave., Dallas, Texas 75207, [145]the official exhibit contractor and decorator of said Gibson Trade Show. All such equipment shall be delivered up by Lessee to Freeman Decorating Company at the end of this sublease in substantially as good condition as when obtained, reasonable wear and tear excepted (CX 1097B).
>
> 3. Lessee shall not exhibit or sell or take any order for the sale of any goods, wares, merchandise or services at Gibson Trade Show other than those itemized on the printed SHOW ORDER SHEETS supplied to Lessee by Lessor pursuant to previous agreements between Lessee and Lessor (CX 1097B).

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[78] West and Company and Howard Brothers operate under their own name in some locations and under the Gibson name as Gibson franchisees in other locations. See Finding 185.

> This sub-lease agreement is conditioned upon Lessee agreeing that he will sell merchandise to all Gibson Franchise Holders at the same price for like quantities. Lessee further agrees that in the event he offers merchandise to any Gibson Franchise Holder at a price lower than that specified on the Gibson Show Sheet that he will make the same price available to all Gibson Franchise Holders, making retroactive price adjustments, if necessary, to comply (CX 1097A).

See CX 207A–B, 210A, 211A–B, 301A, 302A, 308A, 470D–E, 473D–E, 482C–D, 488D–E, 492C–D, 497D–E, 500D, 580A–B, 645, 648B–C, 658, 662B–C, 668B–C, 674A–B, 681, 687, 692, 847A, 1086A–C, 1087, 1088, 1092, 1093A–B, 1094, 1095, 1096A–B, 1097A–B, 1098A–B, 1099A–B, 1100A–B, 1101A–B, 1102A–B, 1103A–B, 1104A–B, 1105A–B; SR 35A, 35E.

371. The agreements in effect between Gibson, Sr. and suppliers participating in the Gibson Trade Show in the period 1969 to 1972 limited the supplier's sales presentations at the Gibson Trade Show to sales efforts directed almost exclusively to the Gibson Discount Centers by providing that: [146]

> WHEREAS *Lessor has reserved the right to sub-lease exhibition booth space* in said Market Hall (during the term of said primary lease) *to such persons, firms, and corporations as he may choose* in his sole discretion *for the purpose of exhibiting and selling goods, wares, merchandise or services to owners, operators, and managers of GIBSON DISCOUNT CENTERS which are admitted by Lessor* to said GIBSON TRADE SHOW (CX 1097A. See also CX 301A, 308A, 470D, 1103A) (emphasis added).

> 3. *Lessee shall not exhibit or sell or take any order for the sale of any goods, wares, merchandise or services at Gibson Trade Show other than those itemized on the printed SHOW ORDER SHEETS* supplied to Lessee by Lessor pursuant to previous agreements between Lessee and Lessor (CX 1097B) (emphasis added).[79]

> *This sub-lease agreement is conditioned upon Lessee agreeing that he will sell merchandise to all Gibson Franchise Holders* at the same price for like quantities. Lessee further agrees that in the event he offers merchandise to any Gibson Franchise Holder at a price lower than that specified on the Gibson Show Sheet that he will make the same price available to all Gibson Franchise Holders, making retroactive price adjustments, if necessary, to comply (CX 1097A. See also CX 308A, 648B) (emphasis added).

In fact, participating suppliers made sales at the Gibson Trade Show in the relevant period only to retail stores operating under the Gibson name (Findings 147, 172, 241, 322).

The Gibson Trade Show, at least in that period, was limited to the Gibson Discount Centers and, thus, run for their benefit. [147]

372. The provision on the show sheets regarding price approval by the respondents' Seagoville offices with respect to any changes in the prices listed on the show sheets is inconsistent with the claim that the

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[79] Show sheets were preprinted with the Gibson Products trade name under the "ship to column" in the period 1969–1972 (Finding 91).

Gibson Trade Show acts as a manufacturer's representative (Finding 93).

373. The staffing of booths at the trade show involved the furnishing of services for the benefit of Gibson Discount Centers attending the trade show. However, such services were furnished in connection with the original sale of such goods to the retail stores and not in connection with their promotion for resale (Findings 64, 71, 73).

374. The suppliers incurred various costs associated with operating booths at the Gibson Trade Show. Decorating, electrical, telephone, drayage and assorted other expenses were paid directly by suppliers to the company providing the particular service. There is no record evidence that these payments were received by the Gibson Trade Show (see, *e.g.*, CX 468A–C, 472A–J, 481A–F, 484A–H, 844A–C, 845A–C, 847B, 849A–B; Mehring 1606–07). Such payments, associated with the staffing of booths by suppliers, were for the benefit of the Gibson stores attending the show (Finding 71). Such services were in connection with the original sale to such retailers (Finding 373).

375. The trade show and the services to suppliers associated therewith, such as the show sheets, authorization to sell to the Gibson stores, etc., facilitated sales by the participating suppliers to the Gibson Discount Centers (Findings 64, 68, 71, 85, 90, 97, 128, 158–59, 209, 211, 216, 217, 242, 303, 347). Show fees and booth fees received by respondents constituted payments in connection with services related to the original sale (*e.g.*, Findings 64, 68, 71, 97, 128, 158, 216, 217, 249, 286, 290, 307, 308, 347, 349), and were not promotional payments in connection with the resale of such merchandise. Similarly, supplier advertising in show directories and buyer's guides, directed to the buyers of Gibson retail stores, was not a promotion in connection with the resale of goods at the retail level (Finding 293).

376. The trade show and the payments received in connection therewith originated with respondents. In the case of each supplier, respondents or their employees solicited the show fee and booth fee payments (Findings 95, 97, 99, 127, 153, 176, 286, 327, 361). The show fee payments, based on varying percentages of sales volume, were solicited by respondents or their employees seeking whatever the traffic would bear (Findings 98, 99). Such payments were solicited whether or not a supplier had a standard cooperative advertising or promotional program (*e.g.*, Findings 127, 133, 153, 163, 176, 182). When suppliers had a standard promotional program, the show fees were not paid pursuant to such programs (*e.g.*, Findings 163, 226, 312). [148]

377. The payments were solicited and received even after a supplier had raised the possible illegality of the payment (Findings 153, 156). Respondents were on notice that the show fee payments had no

relationship to any supplier's standard advertising or promotional program (Findings 133, 163, 226, 273, 274, 312, 334). As a result, respondents knew or should have known that the show and booth fee payments were not available to other customers competing with the Gibson retail stores on proportionally equal terms. [149]

III. Evidence under Count II of the Complaint

A. Toastmaster Division, McGraw-Edison Company

378. The Toastmaster Division of the McGraw-Edison Company ("Toastmaster") is a division of the portable appliance and tool group of that corporation (May 3395–96).

Toastmaster, in the period 1969–1973, produced small appliances, power tools, garden tools, electric fans and heaters. These products were produced primarily in Missouri, Iowa and Arkansas and shipped to all of the 50 states (May 3396–97).

379. Toastmaster, which participated in the Gibson Trade Show in the period 1966 through May of 1970, sold its products to the Gibson Discount Centers (May 3399, 3401).

380. The Gibson Trade Shows in which Toastmaster participated were attended only by Gibson stores (May 3409, 3412).

381. Toastmaster's sales volume with the Gibson stores, as of August 1970, had been increasing steadily. The orders written at various Gibson Trade Shows, although sizable, represented only a small percentage of Toastmaster's sales volume with the Gibson stores (CX 102A).

382. Toastmaster's salesman went to the Gibson office, in Seagoville, Texas, to line up booth space for the upcoming shows. In this connection, he dealt mainly with Bobby Regeon and Tommy Perkins (May 3402). Tommy Perkins was the contact for appliances and fans and Bobby Regeon was the person to be contacted on power tools and electric heaters. Perkins, Regeon and the Toastmaster representative agreed on the items to be displayed at the Gibson Trade Show and the booth space to be assigned (May 3402–03).

Toastmaster's representative made a sales presentation to Perkins and Regeon as he would to a customer (May 3405).[80] The Toastmaster representative and the trade show buyers attempted to pick those items which would move in the greatest volume (May 3411). Prices and special deals were discussed at such meetings (May 3404). The decision on the items to be shown was reached as a result of such discussions (May 3405). [150]

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[80] Toastmaster's sales representative referred to Perkins and Regeon as "buyers." They made no actual purchases, but one of the functions of a buyer is to select merchandise (May 3406). Perkins, Regeon and the Toastmaster salesman selected the items to be displayed at the show (May 3407–08).

Perkins, in his discussions with the Toastmaster representative, was interested in the lowest possible prices for the Gibson stores (May 3414). The prices in question applied to both franchised and Seagoville-owned stores (May 3415). Billing and special dating terms for all the Gibson stores were also discussed between Toastmaster representatives and the trade show buyers (May 3415–16).

383. Toastmaster, at the Gibson Trade Show, utilized show sheets and sold orders to buyers for individual stores (May 3408). It intended to sell to all Gibson stores whether franchised or Seagoville-owned (May 3409–3412). Toastmaster participated in the Gibson tabloid; the items featured in the tabloid were publicized by a sign at its display booth at the Gibson Trade Show (May 3423, 3424, 3439).[81]

384. In 1969, Toastmaster's salesman, Henry May, and Tommy Perkins had a conversation pertaining to an upcoming show (May 3432–33). At that time, Perkins stated that he needed a better price to continue promoting or showing Toastmaster in the Gibson Trade Show (May 3433). When Toastmaster's representative stated, "I don't have a better price. We have one price for all" (May 3433), Perkins replied, "You do not cooperate with Seagoville" (May 3434).[82]

In several conversations, Perkins repeated that Toastmaster was not "'cooperating with Seagoville'" (May 3434).[83] Such conversations took place in the period September 1969 - June 1970 (May 3437–38; CX 101). Eventually, Perkins explained that cooperation meant a three percent better price. This was to cover Toastmaster sales both to Gibson franchised and Seagoville stores (May 3440). This request was over and above Toastmaster's three percent standard advertising program (May 3440). [151]

385. At a meeting on June 22, 1970, concerning the upcoming August show, Perkins stated that he did not know whether there would be room for Toastmaster at the show (May 3441). "Cooperation" was again discussed, with Perkins asking for a payment of three percent of sales volume to the Gibson stores (May 3443; CX 101A–B). Toastmaster refused to make such a payment on the ground that it sold to all distributors at the same price (May 3443).[84] [152]

---

[81] Buyers for retail stores were more apt to purchase a tabloid item knowing that it was backed up by advertising in their area (May 3422–23).

[82] Toastmaster was able to participate in the upcoming show in August 1969 (May 3434).

[83] Perkins, on approximately three occasions, demanded a better price and stated that Toastmaster did not cooperate after the initial conversation on this subject (May 3439–40).

[84] The contemporaneous memorandum of Henry May, Toastmaster's sales representative, summarized this conversation, in pertinent part, as follows:

> On September 3, 1969, I wrote you regarding the Gibson Seagoville kick-back conversation I get when I am with the Seagoville buyers. You wrote me on September 12, 1969 that you agree with the way I have handled

(Continued)

386. Toastmaster was unable, at the June 22, 1970, meeting or in subsequent attempts, to get booths for the August 1970 show (May 3347, 3348). Subsequently, it was also unable to get into the November 1970 show because the trade show buyer felt that Toastmaster was not "cooperating" (May 3450–51). This show was important to Toastmaster because of its fan business. The Gibson stores sell a lot of fans (May 3450). Toastmaster was in none of the Gibson Trade Shows in the succeeding period from August 1970 through 1973 (May 3468, 3470).

387. After its exclusion from the August 1970 Gibson Trade Show, Toastmaster made extensive efforts to maintain its sales volume by making sales to the individual Gibson stores (CX 102A–B). In the fall of 1970, Toastmaster's representative told Tommy Perkins that:

> . . .all of our men were continuing calling on the stores and trying to get orders, and servicing, still taking care of defectives, and so forth. And that we certainly would like to be in it. [153]
>
> And I hoped that he was not going to put out a letter on me, and he said he wouldn't (May 3452).[85]

388. In January or February 1971, Henry May saw a copy of a letter sent by Tommy Perkins regarding Toastmaster on a bulletin board in a Gibson store in Fort Worth, Texas on West Highway 80 (May 3462–63; CX 104). This letter, signed by both Bobby Regeon and Tommy Perkins as "Seagoville Buyers," states as follows: [154]

> this matter. Well, three Gibson Shows have gone by since then and there is still the same kick-back conversation in Seagoville. Today at 10:00 a.m. I had an appointment with Tommy Perkins, the appliance buyer in Seagoville, to line up my booths for the August 17th thru 21st Show. I went over our new items, new colors, special offers, etc., and he remarked that Toastmaster and McGraw-Edison Co. do not cooperate with Gibsons enough. He thinks Mr. Gibson should decide whether Toastmaster should be in the next show or not. He says he has talked this with me for over a year and nothing has happened. He says Mr. Gibson can explain a way that the kick-back is not illegal. He wants to have a meeting in Chicago with you and Mr. Gibson, maybe the 11th or 12th of July, before the Housewares show. Tommy thinks Mr. Gibson can convince you to come around to their thinking.
>
> Tommy states that he has written Toastmaster asking for their volume dollar figures and does not get any type answer. He questions whether Toastmaster volume is huge enough to continue being in their shows. However, he says it may be bigger than he thinks. I know why we have not given Gibson this figure. They would use it as a wedge threatening us.

(Memorandum, Henry May to Scott Rexinger, dated June 22, 1970, CX 101A).

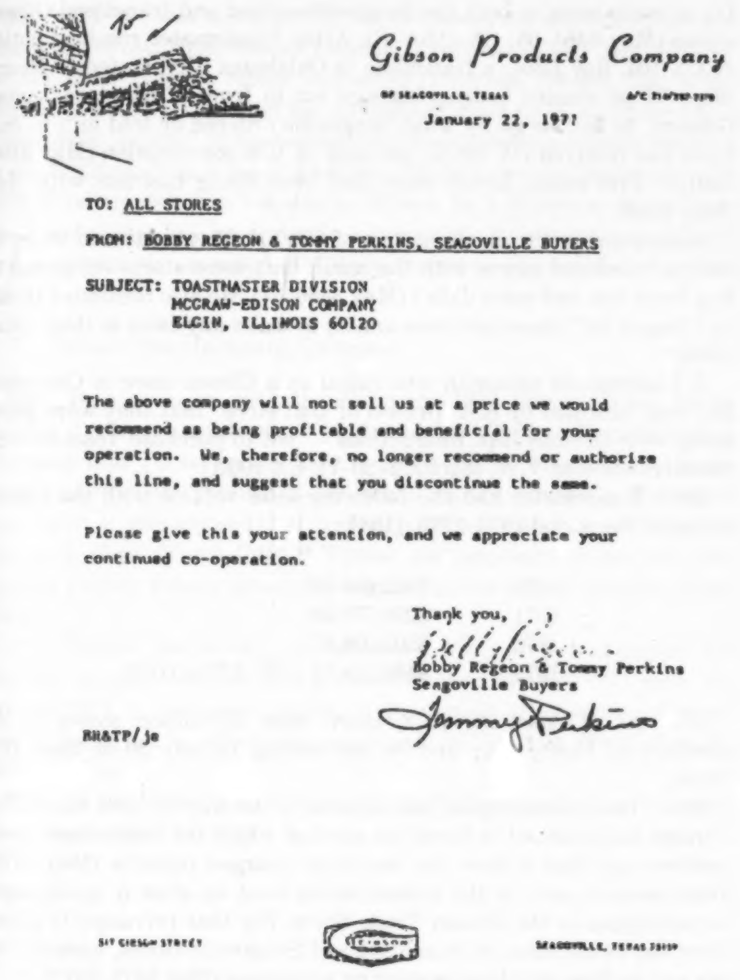
[85] Q. What do you mean "put out a letter on you?"

A. I had heard rumors that there was letters that they had sent out on some different companies, that I didn't want it to be one against me (May 3452).

* * * * * * *

THE WITNESS: Well, my understanding was that the letter would more or less disapprove your line as a source of doing business with. Disapprove your company (May 3455).

The rumors were in fact well-founded. See CX 104, 136 and 308.



15

Gibson Products Company

OF SEAGOVILLE, TEXAS A/C [illegible]

January 22, 1971

TO: ALL STORES

FROM: BOBBY REGEON & TOMMY PERKINS, SEAGOVILLE BUYERS

SUBJECT: TOASTMASTER DIVISION
MCGRAW-EDISON COMPANY
ELGIN, ILLINOIS 60120

The above company will not sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or authorize this line, and suggest that you discontinue the same.

Please give this your attention, and we appreciate your continued co-operation.

Thank you,

Bobby Regeon & Tommy Perkins
Seagoville Buyers

Tommy Perkins

BR&TP/je

517 GIBSON STREET GIBSON SEAGOVILLE, TEXAS 75159

[155]The language of this letter was discussed with Lynn Low, Assistant to H.R. Gibson, Sr., by its author and one of its signatories, Bobby Regeon (Regeon 6641–42).

Toastmaster's sales representative, Henry May, after CX 104 came to his attention, made several attempts to talk to Perkins who told him that there was no longer room for Toastmaster in the show. May was unable to reach Gibson, Sr. when he attempted to do so (May 3469).

389. Toastmaster, after it received notice of CX 104, continued to

try to make sales to both the Seagoville-owned and franchised Gibson stores (May 3464–65; CX 105A–B). After Toastmaster received notice of CX 104, Roy Love, a franchisee in Oklahoma City, stated to Henry May, "if he wanted to keep his sign out in front of his store, saying Gibsons, he had to go by what Seagoville ordered or told him to do." Love had received CX 104 at the time of this conversation (May 3466, 3501).[86] Previously, Love's store had been doing business with May (May 3466).

Subsequent to the dissemination of CX 104, May continued to try to sell to franchised stores with the result that some stores continued to buy from him and some didn't (May 3466–67). He also continued to call on "Seagoville" stores and was unable to make any sales to them (May 3468).[87]

A Toastmaster salesman who called on a Gibson store in Columbia, Mo. was informed by E.A. Drewel of that store "that they were going along with Gibsons Hqs. instructions — not to purchase Toastmaster" (Memorandum of V.W. Moritz, 2-20-71, CX 106A).

390. Toastmaster had the following sales volume with the Gibson stores in the period 1970–1973: [156]

1970	$953,656.53
1971	$296,778.33
1972	$501,036.97
1973	$446,528.74 (CX 117A–D).[88]

391. As of April 25, 1972, there were 93 Gibson stores in the territory of Henry May and he was selling to only 20 of them (CX 116A).

392. Toastmaster again participated in the August 1974 show after Perkins had exlained to them the services which the trade show would perform and that a show fee was to be charged therefor (May 3470). Toastmaster's sales to the Gibson stores went up after it again began to participate in the Gibson Trade Show. For that privilege, it pays a show fee on all sales to franchised and Seagoville stores, namely, two percent on fans and three percent on appliances (May 3471–72).[89]

---

[86] Roy Love was a brother-in-law of Gibson, Sr.; on that basis, the witness felt that the store in question could be classified as a family store (May 3500–02).

[87] Toastmaster personnel referred to the stores owned by Gibson, Sr. as "Seagoville-owned" (May 3400–01).

[88] Similarly, the sales statistics of Henry May reflect a sales volume of $278,000 in 1970, the last full year Toastmaster was in the Gibson Trade Show, as compared to a sales volume of $83,914 for 1971 (CX 116A).

See also the sales figures for Bill Anderson for his sales volume to Gibson stores:

	1969	$206,960
	1970	$222,694
	1971	$ 84,173
(4 months)	1972	$ 75,000 (CX 116C).

[89] The show fee payments are in addition to Toastmaster's standard advertising allowance (May 3471–72).

393. CX 104 was a request to Gibson franchised and family-owned stores to boycott Toastmaster because it refused to pay H.R. Gibson, Sr. the three percent rebate requested (Findings 384–89). The withdrawal of authorization and the recommendation by H.R. Gibson, Sr.'s "Seagoville Buyers" to discontinue the Toastmaster products resulted in a precipitous drop in sales volume to Gibson stores by Toastmaster in 1971 (Finding 390). The request by Gibson, Sr.'s buyers to discontinue the Toastmaster line gave rise to a combination between respondents and a substantial number of Gibson stores to boycott Toastmaster. [157]

B. Tucker Manufacturing Company

394. In connection with the February 1971 Gibson Trade Show, Tommy Perkins, a trade show buyer, advised Tucker Manufacturing Company that Tucker would have to pay a volume rebate for its trade show participation (Tocci 4548–49). When Tucker refused to make such a payment, it was advised that it would not be allowed to participate in the trade show (Tocci 4549).[90] Tucker did not want to pay the two percent volume rebate demanded because of low profit margins (Tocci 4549).

395. Tucker had already, on January 4, 1971, sent in its deposit for payment of booth numbers 585 and 586 for the February 1971 show. On April 8, 1971, it requested return of the deposit after being informed that it would not be allowed to participate in the show (Tocci 4549–50, 4560; CX 304).

396. In the meantime, on March 11, 1971, Tommy Perkins had sent the following letter: [158]

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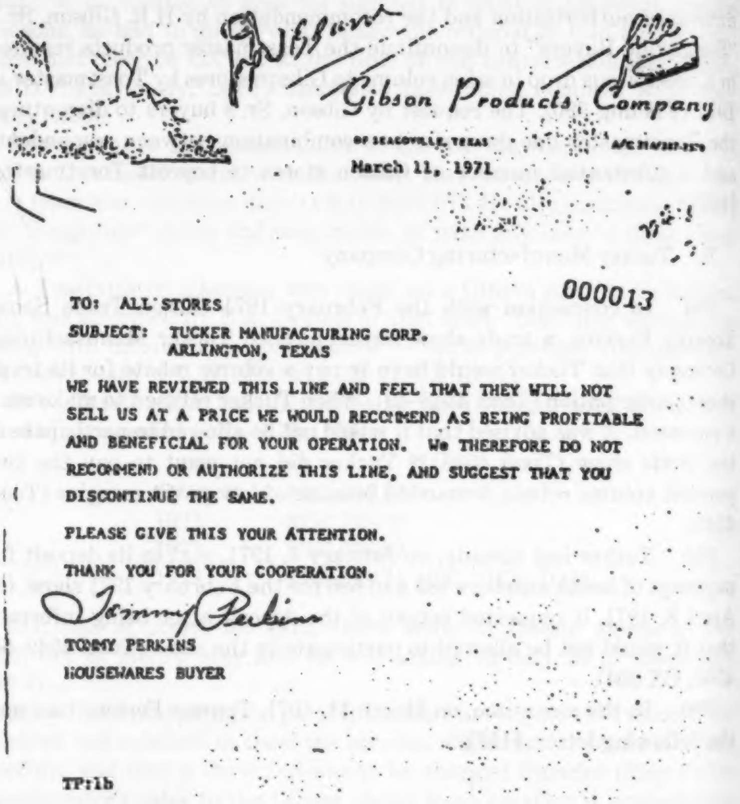
[90] The volume rebate in question was two percent of sales to the Gibson stores (Tocci 4549).



Gibson Products Company

OF SEAGOVILLE, TEXAS A/C [illegible]

March 11, 1971

000013

TO: ALL STORES

SUBJECT: TUCKER MANUFACTURING CORP.
ARLINGTON, TEXAS

WE HAVE REVIEWED THIS LINE AND FEEL THAT THEY WILL NOT SELL US AT A PRICE WE WOULD RECOMMEND AS BEING PROFITABLE AND BENEFICIAL FOR YOUR OPERATION. We THEREFORE DO NOT RECOMMEND OR AUTHORIZE THIS LINE, AND SUGGEST THAT YOU DISCONTINUE THE SAME.

PLEASE GIVE THIS YOUR ATTENTION.

THANK YOU FOR YOUR COOPERATION.

Tommy Perkins

TOMMY PERKINS
HOUSEWARES BUYER

TP:lb

[159]397. Tucker, at the time that it was refused admission to the February 1971 Gibson Trade Show, was selling at a competitive price (Tocci 4559).

398. Tucker's representatives had conversations with Perkins about getting back into the trade show (Tocci 4561). Tucker's representatives were advised that payment of the two percent volume rebate was prerequisite to getting back into the trade show (Tocci 4561–62).

Tucker, as a result, agreed to reestablish the volume rebate of two percent of Tucker's total sales to the Gibson stores (Tocci 4562). Tucker participated in the August 1971 Gibson Trade Show, having agreed to pay the volume rebate approximately two months prior to the actual show date (Tocci 4563).

Tucker had been advised by its sales representatives that the family-owned stores were not authorized to purchase products from it and that the reason it was unable to make sales to such stores was the failure to pay the volume rebate (Tocci 4563–65). Tucker decided to again pay the two percent for that reason (Tocci 4565).

399. In 1973, Tucker discontinued participation in the Gibson Trade Show because of its low profit margin and the requirement for the two percent volume rebate (Tocci 2326–27).

C. Jeannette Glass Company

400. Jeannette Glass Company ("Jeannette"), of Jeannette, Pennsylvania, is engaged in the business of manufacturing and selling glassware (Pawlik 887, 889). These products are shipped throughout the United States and most of the world from Jeannette, Pennsylvania (Pawlik 889–90).

401. Jeannette, in the period 1967 to the end of 1970, sold to Gibson franchised stores and family-owned stores (Pawlik 909–10). Jeannette contacted Tommy Perkins with respect to both categories of stores (Pawlik 911).

402. In the period 1967–1971, Jeannette did not offer advertising allowances to its customers (Pawlik 915). It offered quarterly specials to all its customers. Jeannette also had a jobbers' discount of ten percent off list price available to jobbers, mass merchandisers and volume users, including the Gibson stores (Pawlik 921–22). [160]

403. Jeannette participated in the Gibson Trade Show (Pawlik 922). Prerequisite to getting into the trade show, Jeannette had to have its line approved by trade show personnel (Pawlik 923). In order to get its lines approved in the period 1967–1971, Jeannette dealt with Tommy Perkins (Pawlik 924, 926).

Jeannette wanted to get into the Gibson Trade Show because "Gibson does a terrific amount of business" (Pawlik 926–27). The only stores attending the Gibson Trade Show in the period 1967–1970 were Gibson stores (Pawlik 927–28). And, this was also true in 1974 and 1975 (Pawlik 930).

404. Jeannette's brokers advised its officials that Tommy Perkins had asked for a five percent rebate on sales to Gibson stores (Pawlik 941–43. See also CX 124A). This rebate was to be paid to Gibson, Sr. and not to the individual stores (Pawlik 943). Jeannette's officials

rejected the suggestion by its brokers as well as similar requests by trade show officials that rebates be paid to Gibson Products Company in the period 1969–1971 (CX 124A–B, 132A–B, 134A–B; Pawlik 963–64). They refused to pay the five percent rebate requested (Pawlik 974).[91]

405. On March 30, 1971, Tommy Perkins, on behalf of Gibson Products Company, wrote the following letter to "All Stores": [161]

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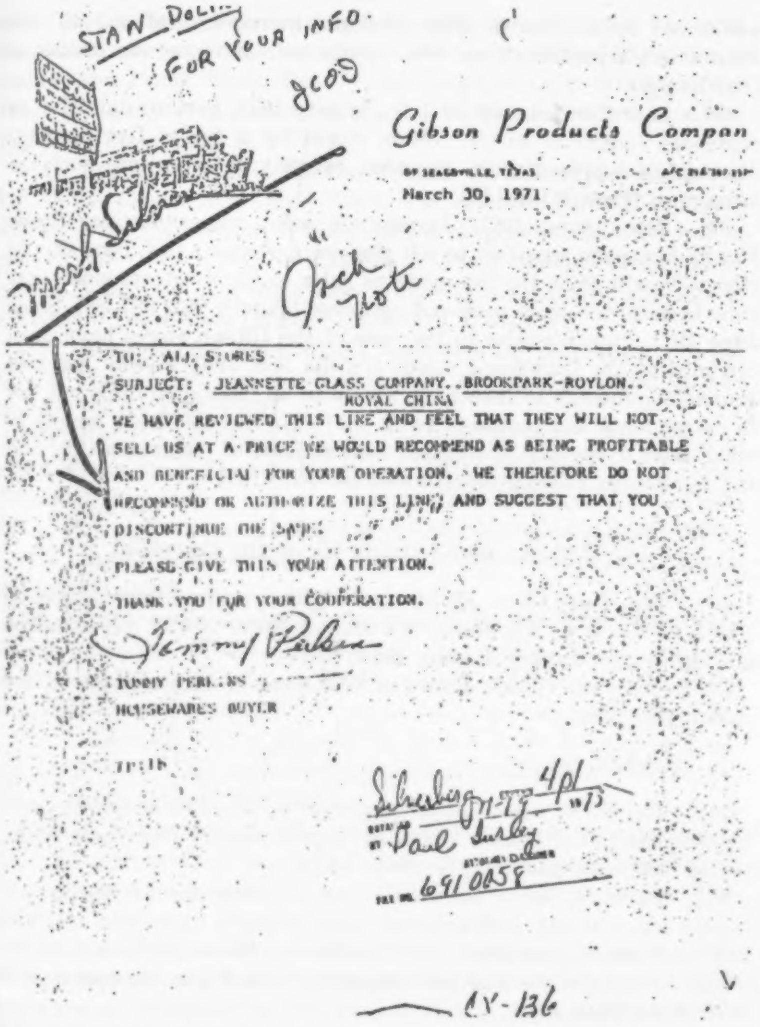
[91] Jeannette made no payments to its customers based on a percentage of sales in the period 1968–1971 (Pawlik 974).



STAN DOLI

FOR YOUR INFO.

JCOD

Gibson Products Compan

OF SEAGOVILLE, TEXAS

March 30, 1971

Jack Note

TO: ALL STORES

SUBJECT: JEANNETTE GLASS COMPANY. BROOKPARK-ROYLON. ROYAL CHINA

WE HAVE REVIEWED THIS LINE AND FEEL THAT THEY WILL NOT SELL US AT A PRICE WE WOULD RECOMMEND AS BEING PROFITABLE AND BENEFICIAL FOR YOUR OPERATION. WE THEREFORE DO NOT RECOMMEND OR AUTHORIZE THIS LINE AND SUGGEST THAT YOU DISCONTINUE THE SAME.

PLEASE GIVE THIS YOUR ATTENTION.

THANK YOU FOR YOUR COOPERATION.

Tommy Perkins

TOMMY PERKINS
HOUSEWARES BUYER

TP:lb

Silverberg 71-15 4/21 1973
Paul Surley
FILE NO. 6910058

CX-136

[162]406. Subsequently, Jeannette's sales representative[92] attempted to contact Tommy Perkins to get back in the show (Pawlik 975). Perkins rejected the Jeannette lines and refused to approve them, since Jeannette had dropped out of the show. According to Perkins, other lines had replaced Jeannette and there was no need for

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[92] This individual, up to June 1971, had been Jeannette's midwest sales manager and then went into business for himself as a sales or manufacturer's representative (Pawlik 975).

additional lines (Pawlik 976). Perkins, moreover, refused to see Jeannette's representatives when contacted on numerous occasions (Pawlik 980).

407. In the period July 1971 to January 1972, Perkins did offer to represent Jeannette to the Gibson stores for a fee of five percent. Jeannette's representative, however, refused to enter into such an agreement (Pawlik 1013–16).

408. Since June 1971, Jeannette's sales representative, Steve Pawlik has made an effort to sell glassware products to Gibson family stores (Pawlik 982). He has made no sales to family stores since that time because the lines were not approved (Pawlik 982, 987–88). Since June 1971, Pawlik's sales in the case of the Gibson stores have been confined to the franchised stores (Pawlik 988, 990). Pawlik has sold Jeannette products to franchised stores on an individual basis but not to respondents' warehouse (Pawlik 1011). He has also been unable to make sales to certain franchisees such as Love of Oklahoma City and the San Benito, Texas group (Pawlik 991–92). [163]

IV. Evidence under Count III of the Complaint

409. The Ray-O-Vac Division of ESB Incorporated[93] ("Ray-O-Vac"), of Madison, Wisconsin, is a manufacturer of dry cell batteries and lighting products (CX 140A, 154A, 169A).

Its sales to the Gibson stores in 1975 were in excess of $2 million (Blake 4449–50).

A. Barshell, Inc.

410. Jim Miller was a broker employed by Ray-O-Vac to represent its products to the Gibson stores for approximately five years in the period 1969 to January 1, 1974 (Blake 4430).

411. Barshell, Inc. ("Barshell") was a distributor of health and beauty aid products, redistributing such products to various retailers and wholesalers throughout the Southwest (Miller 3118). Jim Miller wholly owned the stock of this corporation which was incorporated in 1971 (Miller 3118–19).

412. Ray-O-Vac did not consider the Gibson Trade Show to be its sales representative at the time that it was represented by Barshell, Inc. In Ray-O-Vac's view, the Gibson Trade Show is a service organization which helps a manufacturer to display his wares (Blake 4436).

413. Gibson, Sr. placed an order in 1969 for some 60–70 of the so-

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[93] Acquired by International Nickel Company (Blake 4418).

called family stores. This order was given to start off Ray-O-Vac with the Gibson stores pursuant to a sales call by Jim Miller, Ray-O-Vac's broker, and Frank Blake, Ray-O-Vac's Regional Sales Manager. The order in question, moreover, was not a recommendation but a flat shipment (Blake 4422–23, 4479).

414. Beginning in 1971, Barshell became the sales representative of Ray-O-Vac (Miller 3119–20).[94] Ray-O-Vac retained Barshell to represent it to the Gibson stores. Under this arrangement, Barshell was to present Ray-O-Vac's sales promotions to Gibson headquarters, conduct necessary negotiations, have Ray-O-Vac's products listed and attend the Gibson Trade Show (Miller 3121, 3126; CX 154A–F).

415. Barshell paid Ray-O-Vac's booth fees for participation in the Gibson Trade Show and was reimbursed for such payments by the supplier (Blake 4448). [164]

416. Ray-O-Vac, through its broker Barshell, Inc., participated in every Gibson Trade Show to the end of 1973 (Blake 4424). In the period 1969–1975, Ray-O-Vac, however, paid no show fee to the Gibson Trade Show, although its representatives participated therein (Blake 4443).

417. Ray-O-Vac compensated Barshell with a ten percent brokerage fee (CX 154B).

418. As far as Barshell was concerned, at the time that it sold to the Gibson accounts, Gibson, Sr. was a very enormous and powerful customer (Miller 3135). About eighty percent of Barshell's sales at the time it represented Ray-O-Vac were to the Gibson stores (Miller 3139).

419. When Ray-O-Vac got into the Gibson Trade Show, Gibson, Sr. approved Ray-O-Vac products for purchase by Gibson franchised and Gibson family stores (Miller 3141).

Barshell had numerous meetings with Gibson, Sr. or his buyers after it began representing Ray-O-Vac. Such meetings, concerning Ray-O-Vac, occurred prior to almost every Gibson Trade Show (Miller 3126–27).[95]

Prices were discussed at some of those meetings. On one occasion, there was a discussion concerning a nine percent discount, either in deal form or in advertising, to Gibson or Gibson stores buying the Ray-O-Vac line (Miller 3128–29).

420. On a number of occasions, H.R. Gibson, Sr. visited the office of Jim Miller in connection with Ray-O-Vac (Miller 3132). On such visits, Gibson, Sr. negotiated deals with Miller and Barshell to pay Gibson or the Gibson Trade Show promotional allowances based on sales and the

---

[94] Prior thereto Miller owned another corporation which had represented the Ray-O-Vac account at that time (Miller 3120).

[95] Frank Blake, of Ray-O-Vac, was present at a number of those meetings (Miller 3128).

activities Gibson performed to sell Ray-O-Vac products to the Gibson stores (Miller 3132).[96]

[165]The basis of such payments to Gibson, Sr. by Barshell, pertaining to Ray-O-Vac (Miller 3132–33), varied:

> Well, it would just depend. Mr. Gibson, was never consistent with that. It would depend on what he felt like he did for you.
>
> If he had written a general order, where he had insisted that the stores, or suggested that the stores buy a certain quantity of merchandise, and if this order amounted to a hundred thousand dollars, he would expect more from the agency than he would if you had solicited the business yourself from those stores (Miller 3133).

421. Ray-O-Vac automatically sent commission statements to Barshell (Miller 3134). The commission statements recorded all of Ray-O-Vac's shipments to the individual Gibson stores, showing the dollar volume shipped to those stores; along with the dollar volume figures, such statements showed the commission which Barshell had earned through those sales (Miller 3134). Gibson, Sr. checked Barshell's commission statements received from Ray-O-Vac in connection with his visits to Miller concerning Barshell's activities for that supplier (Miller 3132–33).

422. After Gibson, Sr. had checked Ray-O-Vac's commission statements, Barshell made payments to Gibson, Sr., termed promotional allowances, on the basis of Ray-O-Vac sales recorded in such commission statements (Miller 3132–35). CX 192, a Barshell check in the amount of $13,173.43, dated September 23, 1972, is one such payment (Miller 3134–35).[97] [166]

423. CX 192 is a check transmitting brokerage fees by Barshell, received from Ray-O-Vac, to H.R. Gibson, Sr. (Miller 3132–35, 3140, 3147–48)[98] at a time when Gibson, Sr. was owner and operator of

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[96] Q. Now, when you are referring to Gibson, who are you speaking of?

A. Well, that would be Mr. Gibson, Sr., or Gibson Trade Show. Because it was, you know, kind of interwoven there. We really never knew who we were dealing with (Miller 3132).

[97] The check is made out to H.R. Gibson, and endorsed "H.R. Gibson DBA Gibson Products Company" (CX 192). The witness testified:

> JUDGE VON BRAND: All right. Where did the commission statement originate?
>
> THE WITNESS: They would originate with the Ray-O-Vac Company. They would be sent to us automatically.
>
> JUDGE VON BRAND: Proceed.
>
> (A paper was marked for identification as Commission's Exhibit No. 192.)
>
> By Mr. Brookshire:
>
> Q. Mr. Miller, I hand you what has been marked as CX–192 for identification. And I ask if you can identify that document, please, sir?
>
> A. Yes. This is a check drawn on North Central State Bank on Barshell, Incorporated, dated 9–23–1972, in the amount of $13,173.43.
>
> Q. What was the purpose of that check?
>
> A. This would have been promotional allowance given to Gibson for whatever group of commission statements or activity covered for a period of time with Gibson (Tr. 3134–35).

[98] Q. Mr. Miller, referring to a document which has been identified, or been admitted into evidence as CX–192, were there ever any other checks issued under the same or similar circumstances by Barshell?

(Continued)

various retail stores or, in short, a buyer from Ray-O-Vac (Findings 5, 6). [168]

424. Frank Blake, the Ray-O-Vac official responsible, has not discussed with brokers their disposition of the Ray-O-Vac commissions. "We pay the commissions, what he [the broker] does with them is his business" (Blake 4484).

B. Al Cohen Associates, Inc.

425. Al Cohen Associates, Inc. ("Al Cohen"), of 12514 Gulf Freeway, Houston, Texas, is a corporation formed in 1961 or 1962 (Cohen 3981–82). Al Cohen, a sales representative, is essentially a one man business (Cohen 3980). Its only officers and shareholders are Alpha Meyer Cohen and his wife (Cohen 3981).

426. Al Cohen acquired the Ray-O-Vac account on December 28, 1973, to become effective on January 1, 1974 (Cohen 3987–88, 3992; CX 169A–C). The representation agreement provides that Al Cohen is to represent Ray-O-Vac to:

A. Gibson Discount Centers, Inc. Seagoville, Texas
B. All Gibson franchise stores (CX 169A).

The agreement further provides, in pertinent part:

> PERFORMANCE
>
> The REPRESENTATIVE agrees to do the following:
>
> A. To maintain continuous headquarters contact with Gibson Discount Centers in Seagoville, Texas.
>
> B. To secure adequate space in any dealer shows the COMPANY desires to enter through Gibson Discount Centers, Inc.
>
> C. To supply adequate manpower in conjunction with the COMPANY'S manpower to adequately man the booths at any of these dealer shows.
>
> D. To assist COMPANY personnel to service at retail all Gibson Discount Centers throughout the United States. [169]
>
> E. To refrain from acting in any capacity as a promoter of sales of product which compete with those listed in Paragraph #2 above, and which are not manufactured by the COMPANY.
>
> F. To send orders to the COMPANY promptly as they are received.

A. Yes.
Q. To who?
A. To Gibson. Mr. Gibson, Sr.
Q. Do you recall whether or not such checks were issued in 1971?
A. I would have to assume that they were. Offhand, I don't recall. I would have to assume, yes, depending upon what time of the year that Barshell took over the representation of Ray-O-Vac.
Q. How often were these checks payable?
A. Well, most of the time, it would depend upon when Mr. Gibson came by and sat down to negotiate with us. And that could be anywhere from, usually every other month, to three or four months (Tr. 3140).

COMPENSATION
In return for performance of the duties specified in Point #2 above, the COMPANY agrees to pay the REPRESENTATIVE ten per cent (10%) of net sales billed for sales which result from orders solicited by the REPRESENTATIVE (CX 169A–B).

427. Ray-O-Vac also paid commissions to Al Cohen on sales to the Gibson stores generated by the calls of Ray-O-Vac's own sales staff (Blake 4488).

428. Alpha M. Cohen contacted H.R. Gibson, Sr. after he received the Ray-O-Vac contract, and an oral agreement between these two respondents was reached (Cohen 4007–08).[99] Under that agreement, Gibson, Sr. was to increase the sales volume of Ray-O-Vac the best way he knew how. Otherwise, Gibson, Sr.'s functions pursuant to this verbal agreement were not spelled out (Cohen 4008). Cohen, under this agreement, undertook to pay Gibson, Sr. ninety percent of the ten percent commission which Al Cohen received from Ray-O-Vac (Cohen 4011–12). Put another way, Gibson, Sr. received a payment equivalent to nine percent of Ray-O-Vac's sales to the various Gibson stores. [170]

429. Al Cohen made such payments monthly by check to Gibson, Sr. after receipt of a commission check and statement from Ray-O-Vac (Cohen 4012–15; CX 1212–17). Such payments commenced in 1974 and continued up until at least March 1978 (Cohen 4015–16).

In 1974, payments of commissions by Al Cohen to Gibson, Sr. totaled $174,907.10 (CX 1218).

The record shows the following commission payments by Cohen to Gibson, Sr. in 1975:

January 15	$ 17,972.39
January 31	10,901.47
March 10	7,327.26
April 14	25,398.00
April 30	31,634.99
June 10	10,127.29
July 7	12,986.47
July 31	17,746.04
September 4	16,367.02
Total	$150,460.93 (CX 1215–17).

430. Alpha Cohen's assertion that H.R. Gibson, Sr. is a salesman to whom he sublet the Ray-O-Vac line is undercut by his recognition of Gibson, Sr.'s buying function in behalf of the Gibson stores:

---

[99] According to Alpha Cohen:

> Mr. H.R. Gibson, Sr. agreed to do the lion's share of the work in advancing the sale of Ray-O-Vac products to the Gibson stores through his trade show and we worked out an agreement where he would do the lion's share of the work and I would pay him for that work (Tr. 4007).

Q. Did Mr. Gibson ever solicit you to give a special reduced price to the stores that use the Gibson name?

A. I dont't believe I understand your question, Mr. Steele.

Q. Let me take it this way; in the period 1969 through 1974, to your recollection, did Mr. Gibson, Herbert R. Gibson, Sr. come to you and request that you work out any reduced prices for the Gibson stores on any line?

A. Mr. Steele, awhile ago I told you that all buyers are interested in price, everyone of them, whether they be H.R. Gibson, Sr. or Mr. Bill Houton with Winn stores or regardless of who it is, they are always bucking for a better price. I don't care who you are. [171]

To specifically say that he has bucked for a better price for the Gibson stores with the Gibson name, it would be difficult for me to answer that either way because everyone of them tried to get a better price (Cohen 4077–78).[100]

431. Gibson, Sr., although "bucking for a better price" (Finding 430), was not himself a buyer in 1974 or 1975 (Finding 25). [172]

DISCUSSION

I. The Issues

The complaint alleges that respondents, through the operation of a trade show, violated Section 5 of the Federal Trade Commission Act and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The details of the complaint have already been outlined and need not be repeated here (See Preliminary Statement). Essentially, the Section 5 charges under Count I allege that respondents have induced and/or received from suppliers various promotional payments and services not available on proportionally equal terms to those who compete with them in the resale of such products. Count II alleges that respondents have agreed, combined and engaged in an understanding and conspiracy with all or some of the Gibson family-owned and franchise stores to eliminate or boycott suppliers who did not grant the special allowances charged as illegal under Count I. Count III of the complaint charges that the Gibson respondents and certain brokers or sales representatives have, in violation of Section 2(c) of the Robinson-Patman Act, collected brokerage, commissions or other compensations from sellers of various products when, in fact, the brokers were acting for or in behalf of the Gibson family or corporate respondents or subject to the direct or indirect control of the Gibson respondents.

At this stage, the case presents a multiplicity of issues under all counts of the complaint. Common to all counts are the following questions: (1) is the Gibson Trade Show conducted by H.R. Gibson, Sr.

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[100] Cohen's recognition of Gibson, Sr.'s buying function is not vitiated by his assertion, at Tr. 4078, that he did not consider Gibson, Sr. to be a buyer in 1973 and 1974 because he then owned no stores. While technically correct, it ignores the practicalities of the situation he had recognized in his previous answer. Compare also Finding 81 and note 15.

a bona fide manufacturer's agent representing suppliers participating therein; (2) is the Gibson Trade Show so interrelated with the various Gibson family and corporate respondents that respondents' franchising, trade show and retailing operations should be considered as an integrated enterprise; (3) should the services of the trade show and related payments be regarded as for the benefit of participating retailers or for the benefit of participating manufacturers or both; (4) was the Gibson Trade Show open to all retailers desiring to participate therein; and, (5) is the Gibson Trade Show oriented to the Gibson Discount Centers.

Under Count I, the following issues should be resolved: (1) under Count I, must the government prove the requisite elements of a violation under Sections 2(d) and 2(e) of the Robinson-Patman Act; (2) is the Gibson Trade Show a promotional service furnished by respondents in connection with the resale of goods or is it essentially a vehicle for suppliers to make the original sale to retailers; (3) should the legality of the [173]Gibson Trade Show fees more properly have been tested under the price discrimination sections of the Robinson-Patman Act; (4) has the government sustained its burden of proof in showing that respondents have knowingly induced suppliers to pay allowances not available on proportionally equal terms to customers competing in the resale of such goods; (5) has the government sustained its burden of proof in showing that allegedly nonfavored customers were on the same functional level and in sufficient geographic proximity to warrant a finding that they compete with retailers operating under the Gibson name; and, (6) has the government sustained its burden of proof in demonstrating that Gibson stores and nonfavored customers purchased goods of like grade and quality at contemporaneous times.

The primary questions to be resolved under Count II of the complaint are the following: (1) did respondents issue an invitation to boycott by virtue of letters from trade show buyers asking "All Stores" to discontinue purchases of certain suppliers, and did a boycott and/or combination in restraint of trade result from such invitations; (2) were such letters sent or circulated to all the Gibson stores or a substantial number thereof; and, (3) did trade show buyers employed by Gibson, Sr., signing and sending such letters, have authority to request stores operating under the Gibson name to discontinue dealing with certain suppliers.

Count III presents the following issues: (1) under complaint counsel's theory of the case, is it necessary to demonstrate that H.R. Gibson, Sr. received the brokerage or commission payments in issue as a "buyer." If so, has that criterion been met; (2) in any event, are the payments in question sanctioned by the "for services rendered" section of the statute; (3) is the element of price discrimination prerequisite to a showing of a violation of Section 2(c) of the Robinson-Patman Act; and, (4) after October 31, 1972, was H.R. Gibson, Sr. a dummy broker, agent or intermediary acting in behalf of the other respondents. If so, does the theory under which the case was tried preclude the finding of a violation on that basis. [174]

II. The Function of the Gibson Trade Show

An issue common to all counts of the complaint is the nature of the functions performed by the Gibson Trade Show. Complaint counsel urge that the trade show, the individual respondents and their various corporations, including the retailing operations, should be considered a single economic entity. Respondents, on the other hand, contend that the trade show functions as a manufacturer's representative selling to retailers, with no relationship to the retailing operations under the Gibson name, whether "family" or franchised stores.

The central fact is that Gibson, Sr., in the period 1969 to October 31, 1972, simultaneously operated the trade show as an individual proprietorship, controlled various retail stores and individually licensed several hundred retailers, from whom he also collected a monthly licensing fee, to use the Gibson trade names (Findings 3, 4, 5, 6, 44, 47, 50). After Gibson, Sr. divested himself of his retail interests to his sons on October 31, 1972, the trade show continued to operate without essential change from its past operations.

The Gibson Trade Show, in the period 1969–1972, was confined essentially to retailers operating under the Gibson name (Findings 59, 60–61, 91). Trade show buyers from the "Seagoville Office" contacted suppliers in connection with "all the Gibson chain stores regardless of owner" (CX 307). Meetings of Gibson franchisees were held in conjunction with the trade shows (Finding 72). Trade show buyers authorized and listed the items which could be sold through the trade show (Finding 75). Trade show buyers' culled deadwood from the suppliers lines and, in effect, preselected the items to be sold at the show (Finding 80). Gibson Trade Show buyers negotiated for better or competitive prices and billing terms [175](Finding 81).[101] Show sheets,

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[101] Respondents assert that evidence as to price negotiations may not be relied upon in connection with the interrelationship issue, viz., the relationship of the Gibson Trade Show to the retailers. However, the December 7, 1977 Order, on which they rely, was limited to Count I evidence because respondents had no opportunity for third party discovery on the issue of proportional availability as it might relate to show prices and billing terms. Evidence on this point by the general witnesses was expressly permitted on "the interrelationship issue, including the function which Respondents' trade show officials perform" (Tr. 3773). In connection with this ruling, it was noted that insofar as the general witnesses testified as to the methodology of negotiating and approving show prices and billing terms, no third party discovery was necessary (Tr. 3765–66, 3777. See also Tr. 3537–38, 3558–60). Where the evidence is limited to the function performed by trade show employees and proportional availability is not involved, respondents need no discovery from nonparties. For example, respondents clearly did not need nonparty discovery as to Gibson, Sr.'s

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i.e., order forms and price lists, which were an integral part of the trade show operation, were preprinted with only the Gibson Products name on that section of the form identifying the retailer giving the order (Finding 91). Respondents' show sheets instructed manufacturers not to ship at prices higher than those listed thereon and to contact respondents' "Seagoville, Texas offices" for price approval (Finding 93). At the shows, the trade show buyers or merchandise managers could do little more than introduce retailers to the supplier's sales representatives. The trade show buyers, because of the number of lines that they represented, had to leave the actual selling at the shows to the "factory" (Finding 87). The Gibson Trade Show simultaneously handled [176]competing suppliers (Finding 86). Gibson, Sr., while simultaneously owning and operating certain Gibson stores, franchising others and conducting his trade show, requested suppliers to participate in newspaper advertising promoting merchandise in the Gibson stores to the consumer (Findings 113–16). There was extensive overlap in the directors and officers of the respondent corporations and certain nonrespondent corporations operating Gibson stores by virtue of the offices held by the individual respondents, including Gibson, Sr., in the period 1969–1972 (Finding 12; Appendix A). The four individual respondents, through publication of store directories in 1970–1971, made or were responsible for making representations creating the net impression that the businesses of the four individual respondents and the corporate respondents were an integrated operation (Findings 39–41). Finally, trade show buyers suggested that the Gibson retailers stop buying from certain suppliers because "They will not sell us at a price we would recommend as being profitable and beneficial for your operation" (CX 104, 136, 303).

In the period 1969-October 31, 1972, Gibson, Sr., while he operated the trade show, had a direct financial interest in the stores he operated as well as in the financial health of the franchised stores from whom he derived franchise fees (Findings 6, 47, 49). The Gibson Trade Show, as already noted, benefited the retailers operating under the Gibson name in various ways. At the same time, the trade show, whose revenues Gibson, Sr. pocketed, depended on the attendance of the Gibson stores to attract the participation of suppliers. The Gibson family-owned retail operation, the franchising business and the trade show, as well as

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testimony that he sought a competitive price so that the Gibson stores, in making a purchase, "wouldn't get stuck on it" (Finding 81 and note 15). There is no need to find a price discrimination to define the Gibson Trade Show's role. The benefit to the Gibson retailers from Gibson, Sr.'s concern on this point is plain as is the role played by the trade show on behalf of the retailer.

On this point, see also Order Pertaining to General Witness' Testimony Concerning Show Prices and Billing Terms dated March 14, 1978.

ancillary operations such as Ideal Travel, were mutually interdependent.

The trade show or Gibson, Sr., in dealing with suppliers, accordingly acted on behalf of retailers operating under the Gibson name, and payments to the Gibson Trade Show were for the benefit of participating retailers. In the period 1969 to October 31, 1972, Gibson, Sr. was also a "buyer" (Findings 5–6). The Gibson Trade Show cannot be considered a manufacturer's representative. To the extent that he "represented" manufacturers, the loyalties of Gibson, Sr. or his trade show must be considered divided between suppliers and retailers.

The pattern of the various enterprises, as a whole, conducted by the Gibson respondents and the respondents' mutual interdependence, compels the finding that the Gibson respondents in the period 1969–1972 operated as an integrated enterprise. [177]

III. The Count I Charges

The complaint charges that respondents violated Section 5 of the Federal Trade Commission Act by inducing suppliers to violate Sections 2(d) and 2(e) of the Robinson-Patman Act. Complaint counsel have tried the Count I allegations under the theory that respondents' acts are *per se* illegal (Tr. 39; CPF p. 153). Under the circumstances, they have the burden of proving in this Section 5 proceeding that the statutory elements of Sections 2(d) and 2(e) have been met. There is a "general assimilation of Robinson-Patman standards of liability and proof" in these cases. *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351, 365 (9th Cir. 1966), *rev'd and remanded on other grounds*, 390 U.S. 341 (1968). See also *J. Weingarten, Inc.*, 62 F.T.C. 1521, 1524–25 (1963). In short, the Count I charges, although under Section 5, are not being tried under an incipiency standard.

Under Count I, the Commission must prove the following basic factual elements to demonstrate that respondents have engaged in unfair methods of competition by inducing discriminatory payments violative of the Clayton Act:

(1) that a respondent in commerce knowingly solicited or induced and received from a supplier promotional allowances, services, or facilities;

(2) that the solicited promotional considerations were received in connection with the resale of the supplier's product;

(3) that respondents had competitors at the same functional level; and,

(4) that respondents knew or should have known that its competitors

were not offered the promotional considerations in question on proportionally equal terms.

Alterman Foods, Inc. v. *FTC*, 497 F.2d 993, 997 (5th Cir. 1974).

Respondents contend that neither Gibson, Sr. nor his trade show are "customers" of suppliers participating in the trade show within the meaning of the Robinson-Patman Act. As a result, they argue that no discrimination cognizable under Sections 2(d) and 2(e) of the Robinson-Patman Act has been shown. Respondents urge that a finding that a supplier's "customer" has received the allegedly discriminatory allowance or services is prerequisite to a finding of violation. [178]

The argument misses the mark on two grounds. First, Section 2(d) is not limited to payments "to" a customer. It covers also payments "for the benefit of a customer." See *Swanee Paper Corp.* v. *FTC*, 291 F.2d 833, 836 (2nd Cir. 1961), *cert. denied*, 368 U.S. 987 (1962). In short, there is no need to make a finding that the payments in question were made directly to a buyer. Laying aside, for the moment, the question of whether the trade show constituted a promotional service in connection with the resale, it is clear that the trade show benefited the Gibson retailers as a group. As a result, payments to the trade show in the person of H.R. Gibson, Sr. were, at minimum, payments for the benefit of such customers.

Relying on precedents holding that the corporate entity should not be disregarded, respondents assert that Gibson, Sr. cannot be regarded as a customer since the retail operations in which he had a financial interest, in the period 1969-October 31, 1972, were incorporated. They contend that "[t]he crystal clear fact is that H.R. Gibson, Sr. never had anything to do with the operation of any retailers in this case" (RPF SR p. 236). Gibson, Sr.'s own testimony makes it clear that he played an active role at least in those corporations operating retail stores in which he was a majority stockholder. He hired the key employees, the store managers, and actively reviewed store financial records. And, "Anytime they didn't make money, I had to do something about it. Might get a new manager real quick. I would try to get the store to making money" (Tr. 5573; Finding 6). Gibson, Sr. had the authority to make managerial decisions in those areas that counted and did not hesitate to exercise it. The individual who reviews the performance of key corporate employees and fires them for inadequate performance, as a practical matter, runs that corporation. Gibson, Sr. clearly controlled the retail corporations wherein he had a majority interest in the period 1969 to October 31, 1972.

This testimony and the showing in the record that the trade show operated for the benefit of the Gibson retailers as a group compels the finding that Gibson, Sr., in 1969–1972, combined the function of trade show operator and buyer from the participating suppliers. Trade show payments to Gibson, Sr., in the period 1969-October 31, 1972, were payments to a buyer and for the benefit of retailers operating under the Gibson name. Subsequent to October 31, 1972, they were for the benefit of such retailers. [109]

A crucial point is that the Gibson Trade Show was oriented to the retailers operating under the Gibson name.[102] Accordingly, trade show payments necessarily were for the benefit of the Gibson stores, irrespective of whether Gibson, Sr. had an ownership interest therein or whether the trade show fee payments were passed on. The cases cited by respondents for interposing the corporate veil between Gibson, Sr. and the retail corporations do not apply.

A. Payments or Services Challenged under Sections 2(d) and 2(e) Must Be in Connection with the Promotion of the Goods for Resale

Sections 2(d) and 2(e) impose a more rigid standard than the flexible criteria of the pricing provisions of the statute. As a result, the first essential step in the legal analysis is to ascertain whether the price or promotional provisions of the Act apply. Rowe, *Price Discrimination Under the Robinson-Patman Act*, Little Brown & Company, 372 (1962). Under Section 2(a) of the Act, price discriminations are lawful unless the prescribed adverse effect on competition is shown and unless such discrimination cannot be justified under one of the defenses provided by the statute. Sections 2(d) and 2(e), on the contrary, have a *per se* standard of illegality irrespective of the competitive impact, and the opportunity to defend on the basis of the statutory defenses is sharply circumscribed. *Ibid.* As a result, "the stricter sanctions of these provisions [Sections 2(d) and 2(e)] create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens by classifying trade practices under Sections 2(d) and 2(e) rather than the price provisions in Section 2(a) [or 2(f)]." *Ibid.*

Payments, allowances or discounts in connection with the seller's *original* sale to the buyer are not within the scope of Section 2(d). *New England Confectionary Co.*, 46 F.T.C. 1041, 1059 (1948);[103] *Rutledge* v.

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[102] Consider, for example, Becker's agreement with Gibson Products Company to pay the 10% show fee on purchases by the Gibson stores in consideration for "the listing of our approved products to your stores and allowing us to display our approved products in your private trade show" (Finding 127). Moreover, supplier sales in the relevant period through the Gibson Trade Show were confined to Gibson stores (Finding 371).

[103] The "[m]ere acceptance by a purchaser of a promotional offer intended to facilitate the *original* sale, does not constitute the rendering of a service or facility by the purchaser within the meaning of Section 2(d)." *New England Confectionary Co.*, 46 F.T.C. at 1059 (emphasis added). That decision dismissed allegations charging as illegal under Section 2(d) the payment of rebates or discounts equal to the savings and costs attributed to different procedures followed in packing, selling or delivering its products where respondent compensated the favored customers for such services or facilities performed by them. Such payments, the Commission held, were made in connection with the original sale to the favored customers and not in connection with the resale.

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Electric Hose & Rubber Company, [180]511 F.2d 668, 678 (9th Cir. 1975). And, the coverage of Sections 2(d) and 2(e) is limited by their implicit restrictions to *promotional* arrangements excluding thereby other incidents or terms of sale. Rowe, *supra* at 377.

The reach of Sections 2(d) and 2(e) should be limited to *promotional* arrangements related to the customers' resale of the product, although the literal text of these provisions might reach distributive arrangements in connection with the resale.[104] "[S]uch a limitation is essential to prevent incongruity and overlap between several statutory provisions. If the 'proportional equality' requirements of the provisions governed all distributive 'services' or 'facilities' rather than cooperative promotions alone, the 'functional' discounts implicitly permitted by the price provisions of Section 2(a) for rewarding pure 'wholesalers' marketing functions might be viewed as 'payments' for 'services,'" and, thus, made subject to the proportional availability requirements of Sections 2(d) and 2(e). In addition, legitimate brokerage allowances, regulated by Section 2(c), might also be governed by the proportional equality requirement of Section 2(d). Rowe, *supra* at 380–81. Accordingly, unless Sections 2(d) and 2(e) are limited to cooperative promotional arrangements, they would conflict with the separate price and brokerage provisions of the Act. *Id.* at 381. See also *New England Confectionary Co.*, 46 F.T.C. at 1060; *Carpel Frosted Foods*, 48 F.T.C. 561, 602 (1951).

The Commission in cases of this nature has, in fact, defined as one of the basic elements of this violation:

> The solicitation and receipt by respondent in commerce of payments for *promotional* services in connection with the resale of a supplier's product.

J. Weingarten, 62 F.T.C. at 1524.

[181]The principle that the reach of Sections 2(d) and 2(e) should be limited to promotions in connection with the resale was again confirmed in 1975 by the Ninth Circuit:

> *Section 2(d) does not refer to benefits to "favored buyers" in connection with the original sale to the buyer*, such as discounts, nor does it refer to a seller who charges different prices to different buyers according to the qualification or functional level of the buyer; rather *it refers to payments in connection with the resale by the buyer of the goods, for advertising, promotion or other similar purposes.* Exquisite Form Brassiere, Inc. v. F.T.C., 112 U.S. App. D.C. 175, 301 F.2d 499 (1961); Rowe, Price Discrimination Under the Robinson-Patman Act, at 371. Cf. Surprise Brassiere Co. v. F.T.C., 406 F.2d 711 (5th Cir. 1969).

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[104] *E.g., Champion Spark Plug Co.*, 50 F.T.C. 30, 50 (1953), held that payments for distributional services such as Special Warehouse Compensation were, in fact, reductions in net price not properly alleged as violations of Section 2(d) of the Robinson-Patman Act.

Rutledge v. *Electric Hose & Rubber Company*, 511 F.2d at 678 (emphasis added).

Payments by a supplier to customers or their intermediaries for services performed by the customer or intermediaries of the customer in connection with the *original sale* to such customers, as, for example, sending bulletins to encourage such retailers to make purchases, are not promotional payments within the scope of Section 2(d) of the Act. *Carpel Frosted Foods, Inc.*, 48 F.T.C. at 602. Payments for advertising and promotional services in order to stimulate the resale of the supplier's products *after* the product reaches the store are within the purview of this section. *Ibid.*

The Gibson Trade Show served as a vehicle to facilitate the original sale by suppliers to Gibson family and franchise stores attending such shows. As a practical matter, it enabled participating suppliers to make a sales pitch to Gibson retailers attending the show. The show did not admit consumers and the services performed by respondents for which they were compensated by suppliers were services facilitating the suppliers' sales to the retailers, analogous to the DGS bulletins aiding supplier sales to members of that cooperative in *Carpel*. The Gibson Trade Show, facilitating the vendors' original sales to the retailers, is not a case like *Macy's,* where the buyer "used the payments for institutional advertising and promotions to get more people into its store to buy the goods of all its vendors." *R.H. Macy & Co., Inc.* v. *FTC*, 326 F.2d 445, 450 (2nd Cir. 1964).

The services for which the show fees were paid included authorization to display and sell certain merchandise, listing on the show sheets, introduction to retailers at the show, etc. [182]The booth fees permitted suppliers to display their wares and sell to the Gibson retailers. Supplier advertising in the store directories and buyers guides, circulated to persons attending the show but not to consumers, again related only to the manufacturer's sale to the retailers (Finding 293). The show fees, booth fees and advertising in store directories and buyers guides were compensation for services furnished in connection with the original sale to the retailers. Services such as the staffing and decorating of booths were similarly related to the original sale (See generally Findings 373–75).

Credit arrangements, such as billing terms, are not within the scope of the promotional provisions of the statute since they are connected only with the original sale of the product and not with its further handling or resale. *Secatore's, Inc.* v. *Esso Standard Oil Company*, 171 F. Supp. 665, 668 (D. Mass. 1959). As another court has recently stated, credit terms are not a cause of action under Sections 2(d) or 2(e); rather, they may state a cause of action under Section 2(a). *Robbins*

Flooring, Inc. v. *Federal Floors, Inc.*, CCH Trade Reg. Rep. ¶ 62,259 at 75, 616 (E.D. Pa. 1977).[105] The charge in the complaint that show prices and billing terms induced by respondents were not made available to their competitors on proportionally equal terms is an anomaly.

The determination in *Alterman* that the food shows in that case were in connection with retail resales of the participating suppliers' products has been taken into consideration.[106] Complaint counsel, in urging that the instant proceeding is within the scope of *Alterman*, stress [183]the benefits derived by the Gibson stores from the trade show. The Gibson stores, in fact, benefited from the trade show and from supplier payments underwriting its operation. Such benefits include a convenient place for the retailers to make their purchases (Finding 71), Gibson, Sr.'s attempt to assure them a competitive price so they would not get "stuck" (Finding 81 n. 15),[107] preselection of merchandise (Finding 80), an opportunity to confer with other retailers (Finding 72), etc. Such benefits, however, are not concerned "with any of the services with which Section 2(d) concerns itself, to wit, promotion, advertising or similar activities connected with the resale of goods." *Rutledge* v. *Electric Hose & Rubber Company*, 511 F.2d at 678.

[184]The legality of the show fees, booth fees, and payments for advertising in the buyers guides and store directories could have been challenged under Section 2(f) of the Act. See *New England Confectionary Co.*, 46 F.T.C. at 1060; *Champion Spark Plug Co.*, 50 F.T.C. at 50. An expansive reading of *Alterman*, which would bring such payments within the purview of Section 2(d), as a practical matter, would erase

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[105] See also *Clausen & Sons, Inc.* v. *Theo. Hamm Brewing Co.*, 284 F. Supp. 148, 155 (D. Minn. 1967): ". . . Neither the price discriminations nor the credit preferences alleged in Count III can be considered to be services or facilities furnished in connection with 'the processing, handling, sale, or offering for sale' of Hamm's beer. . . ."

[106] The Fifth Circuit held:

> The record contains substantial evidence supporting the Commission's determination that the food shows were in connection with Alterman's retail resales of the participating suppliers' products. Suppliers were invited by Alterman's buyers who purchased for the Company's retail division as well as for its wholesale business. The Alterman vice-president in charge of retail operations testified that the Company's retail stores and their managers definitely benefit from the food shows. Company literature encouraging retailers to attend the shows stresses the benefits to them of participation. The store managers have general discretion in stocking their stores. By going to a food show, a manager can acquire information on new products. He can also observe methods of promoting sales and building up his store. According to another Alterman vice-president, the food shows "cement the relationship between a food supplier and the retailer." Thus, the suppliers' promotional services at food shows benefited Alterman at the retail level.
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> The profits on booth rentals were, in effect, price reductions on suppliers' products. See *Grand Union Co.* v. *FTC*, 300 F.2d 92, 99 (2d Cir. 1962). Although, as Alterman argues, there is no formal proof that its profits on the food shows were put to use at the retail level, the Commission could properly infer that this additional source of profit enabled the Company to maintain a given overall profit level while charging less in its other operations, an advantage denied to Alterman's competitors. This inference lies within the competence of the Commission and constitutes substantial evidence in the absence of contrary evidence produced by Alterman. See *Colonial Stores, Inc.* v. *FTC*, 450 F.2d 733, 739 n. 13, 741 nn. 17 & 18 (5th Cir. 1971).

Alterman Foods, Inc. v. *FTC*, 497 F.2d at 999.

[107] It is irrelevant that show specials may have been no more advantageous than those available at other shows. The show specials were available at a show oriented to the Gibson retailers.

the distinction between the promotional and price provisions of the Act. Confining the application of Sections 2(d) and 2(e), under the rule of *Rutledge*, "to payments in connection with the resale by the buyer of goods for advertising, promotion or other similar purposes" is the sounder approach.

The record does show that certain suppliers made payments for tabloid advertising to consumers. Such payments are promotional allowances for services in connection with the resale. The fact that some tabloid payments may have been received from certain suppliers does not alter the critical fact that the show fees and other challenged payments made in relation to the Gibson Trade Show are in connection with the original sale. Even where payments are made pursuant to a common program, the applicability of the various allowances to the specific Robinson-Patman provision depends on the nature of the service for which the compensation is paid. See *Carpel Frosted Foods, Inc.*, 48 F.T.C. at 602.[108] The elements of the violation must be proven with respect to each category of payment. All the elements of the violation have not been established in connection with the tabloid payments documented by this record. Complaint counsel have not sustained their burden of showing sales of goods of like grade and quality to respondents and customers competing in the resale of items promoted in the tabloids (See pp. 188–89 *infra*).

The Count I charges will be dismissed since the show fees, booth fees and related services in connection with the original sale are not properly within the scope of Sections 2(d) and 2(e). The other elements of a violation under these [185]sections will, nevertheless, be discussed to facilitate review. Complaint counsel must also demonstrate that the challenged discriminatory allowances or services were knowingly induced, and that such discrimination involved customers purchasing goods of like grade and quality who were competing in the resale of such products. This includes a showing that the favored and nonfavored customers operate at the same functional level in sufficient geographic proximity to support a finding that they compete.

B. Evidence as to Competition in the Resale of Goods of Like Grade And Quality Involved in the Alleged Discriminations

The concept of like grade and quality "was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute." *Report of the Attorney General's Committee to Study the Antitrust Laws*, 157 (1955); *Moog Industries, Inc.* v. *FTC*, 238 F.2d 43, 49–50 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). Although Sections 2(d) and 2(e) of the Robinson-Patman Act do not explicitly refer to the like grade and quality concept contained in the pricing provision of the statute, they are, nevertheless, governed by that limitation. *Atalanta Trading Corp.* v. *FTC*, 258 F.2d 365, 368–69 (2d Cir. 1958). See also *Shulton, Inc.*, 59 F.T.C. 106, 111 (1961). Under the Robinson-Patman Act, unlike the older Clayton Act, the burden is on the plaintiff, here the government, to prove that the goods involved in the allegedly discriminatory transactions are of like grade and quality.[109] the standard of proof which must be met in demonstrating that favored and nonfavored customers compete in the sale of goods of like grade and quality has been formulated as follows:

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[108] The challenged payments to the retailer cooperative in *Carpel* were made pursuant to one contract and in a lump sum. The Commission, in evaluating the nature of the services for which payment was made, noted, "but the activities were of a distinctly different character and involved important differences in their competitive and legal effects." Compensation for distributional services in connection with the original sale to the cooperative acting in behalf of the buyers was ruled within the scope of Section 2(c), since "Those activities were equivalent to the functions of brokers, and the compensation for them was in lieu of brokerage." Payments for services to stimulate the resale of the products *after* they reached the store were held covered by Section 2(d).

> . . .Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made. . . .

J. Weingarten, 62 F.T.C. 1527–28.

[186]The question of whether products are of like grade and quality is to be determined by the characteristics of the products themselves. *FTC* v. *Borden Co.*, 383 U.S. 637, 641 (1966). Physical differences in products are one of the prime determinants in deciding whether or not the like grade and quality criteria are met. *Bona fide* physical differences affecting marketability preclude a finding of like grade and quality even though the differences are small and have no effect on the seller's cost. *Antitrust Law Developments* ABA, 115 (1975). *Universal-Rundle Corp.*, 65 F.T.C. 924, 955 (1964), *order set aside*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded*, 387 U.S. 244 (1967); *The Quaker Oats Co.*, 66 F.T.C. 1131, 1192 (1964); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F. Supp. 312, 314 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir. 1961), *cert. denied*, 368 U.S. 829 (1961). Price differences demonstrating cross-inelasticity and the nonsubstitutability of items also militate against a finding of like grade and quality.[110] *Willow Run Garden Shop, Inc.* v. *Mr. Christmas, Inc.*, 1973–2 Trade Cases ¶ 74,816 (D.N.J. 1973).

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[109] Rowe, *supra* at 64. Under the Clayton Act provisions, preceding the Robinson-Patman Act, a seller might defend by relating pricing variations to the grade or quality of the different products. *Ibid.*

[110] Consider, for example, Parker Pen's "midline" and its "prime line" involving 80 to 100 different priced pens (Finding 166).

Complaint counsel urge that since the show fees are based on a percentage of all sales to Gibson stores during the course of a year, the *Weingarten* criteria need not be met in this instance. Relying on cases such as *Moog Industries, Inc., supra,* they contend that an item-by-item analysis of purchases by favored and nonfavored customers is unnecessary. Cases such as *Moog, Dayton Rubber Company,* 66 F.T.C. 423, 466 (1964), *rev'd in part on other grounds,* 362 F.2d 180 (6th Cir. 1966), and *Joseph A. Kaplan & Sons, Inc.,* 63 F.T.C. 1308, 1348 (1963), *modified on other grounds,* 347 F.2d 785 (D.C. Cir. 1965), held that where a supplier sells or promotes merchandise as a line and the rebates are granted on the line, there is no need to show that favored and nonfavored customers purchased identical items.[111] Those cases are not controlling here. For, although [187]these precedents do not require a showing that all items in the line are identical, at least a minimal showing must be made that the items comprising a "line" are of one grade and quality. There is no basis for the contention that the extraction by a customer of a uniform discount or allowance on all items purchased converts all products that a supplier sells into a "line" within the scope of *Moog, Dayton Rubber,* or *Joseph Kaplan.* To the contrary, those cases involved a fact situation where it was the supplier's determination that goods were to be sold as a "line." Furthermore, the records in those proceedings showed that the items within such lines were of the same grade and quality. In *Moog,* the respondent conceded that its products " 'may all be of one grade and quality.' " *Moog,* 238 F.2d at 49. In *Dayton Rubber,* the Commission found that the record affirmatively showed that "[r]espondent's line was composed of products of only one grade and quality." 66 F.T.C. at 466. In *Joseph Kaplan and Sons,* 63 F.T.C. at 1348, the Commission found, "[w]e have here a line of products promoted as a line, that is, the shower curtain line, and all of the items in the line are used for the same purpose. The fact that this case deals with such a unified line of goods clearly distinguishes the case from *Atalanta.*" In addition, the Commission, in holding that different patterns in shower curtains did not preclude a finding of like grade and quality, also found that some of the products involved in the discrimination "were apparently the same in everything except pattern." 63 F.T.C. at 1348. [188]

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[111] The court in *Moog* held, in pertinent part:

> . . .while leaf springs, coil springs or piston rings may not be interchangeable and usable in all makes, models and ages of automobiles, we believe that when such items are sold to competitors in lines, as petitioner has sold them, and when, as here, a discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are 'sufficiently comparable for price regulation by the statute.'
>
> The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not.

Moog, 238 F.2d at 50.

In this case, for most of the suppliers involved, there is little evidence that the goods sold were sold as "lines" by the supplier. More significantly, there appears to be no affirmative evidence with respect to most of the suppliers involved herein that all the items marketed by such suppliers were of the same grade and quality as was shown in the case of certain lines sold by the manufacturers in *Moog*. Rather, with respect to many of the suppliers involved in this proceeding, the record shows substantial differences in price and in the physical qualities of the products which they marketed to their customers. Variation of merchandise within a line precludes the facile assumption that different customers each purchased an identical or even a similar cross section of merchandise within each line. *Willow Run Garden Shop, Inc.* v. *Mr. Christmas, Inc., supra*. The meaningful way to compare commodities between two competing retailers is on an "'individual item'" basis, not on a "'line item'" basis. *Id.*

In summary, insofar as most of the suppliers herein are concerned, there is little affirmative evidence that all of the items upon which the trade show fees were paid were of the same grade and quality. Under the circumstances, the Commission cannot rely on the auto parts cases or *Joseph Kaplan* for the proposition that an across-the-board discount over the period of a year, in and of itself, obviates the need for analysis of the products purchased by favored and nonfavored customers.

In the case of payments for tabloid advertising, complaint counsel could not prevail even under their interpretation of *Moog*. Complaint counsel recognize that where the payment is for the promotion of a particular item or limited number of items, they have the burden of showing competition in the resale of those items between favored and nonfavored customers[112] (CPF p. 134). Suppliers are not obliged to give advertising allowances on all of their products if they choose to accord them on only some of their products. *Sunbeam Corporation*, 67 F.T.C. 20, 55 (1965); *Atalanta Trading Corp.*, [189]258 F.2d at 369. In short, where a specific item is promoted, a showing must be made that favored and nonfavored customers competed in the resale of that particular product at a time contemporaneous with the challenged promotion.

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[112] See *Shulton*, 59 F.T.C. at 111-12, holding:

> In further excepting to the order, respondent has interpreted such order to require that if it elects to accord advertising or promotional allowances on any product within a product line, such as toiletries, such allowances must be granted on all other products within that line, including those which are not of like grade and quality. Section 2(d), of course, does not impose such a requirement, but neither, however, does the order to cease and desist. Although the order covers all products which respondent sells, respondent will be required thereby to extend allowances granted in connection with a particular product only to those customers competing in the distribution or resale of that product or products of like grade and quality purchased from respondent.

The tabloids generally did not involve across the board promotions; rather, as the Gibson Tabloid Authorization forms showed, they related to particular items, as for example in the case of Parker (Finding 164). With respect to the tabloid advertising shown in this record, the Section 2(d) criteria have not been met. There has been no showing that specific items promoted in the tabloids were resold by favored and nonfavored customers contemporaneously with the promotional event.[113] Thus, no finding of violation can be based thereon.

An additional factor precluding a finding of discrimination or the knowing inducement thereof with respect to tabloid payments in the case of some suppliers, such as Regal and Wagner, is the fact that the payments were within the suppliers' standard advertising or promotional programs (Findings 220–22, 273–74).

The parties also disagree as to proof of geographic proximity prerequisite to a finding of competition between favored and nonfavored customers. Under *Sunbeam Corporation*, 67 F.T.C. at 55, and *Viviano Macaroni Co.*, 73 F.T.C. 313, 341, *aff'd*, 411 F.2d 255 (3d Cir. 1969), there is a rebuttable presumption that competition exists between customers operating at the same functional level so long as they are located in the same trade area. Similarly, there is no need to trace goods to the shelves of competing outlets, where the direct customers of a supplier operate only at one functional level. Then, it is sufficient to prove: **[190]**

> . . .that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer.

Tri-Valley Packing Association v. *FTC*, 329 F.2d 694, 708 (9th Cir. 1964).

In order to meet the requirement of contemporaneous sales of goods of like grade and quality to favored and nonfavored customers competing in the resale of the goods involved in the alleged discriminations, complaint counsel introduced tabulations of invoices for certain of the suppliers.[114] In the case of other suppliers, invoices were provided for the same purpose. For some of the suppliers, there are neither tabulations nor invoices, thus making a finding of contemporaneous sales of goods of like grade and quality to customers competing with Gibson retailers impossible as to such suppliers. Significantly, the tabulations were prepared with no attempt to determine whether the customers listed were wholesalers or retailers (Underwood 4529).[115] Nor was there an attempt made in the preparation of such tabulations to record the individual model or item numbers of the particular products that appeared on the underlying invoices (Underwood 4528–29). As a result, where the record shows that a supplier has a widely differentiated product line, the tabulations are of little help in establishing competition between the Gibson retailers and others in the resale of such merchandise. Other problems of proof also **[191]**exist. Without going into an exhaustive recitation, a number of examples will be noted.

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[113] As respondents note, RRB Br. p. 77 n. 30, complaint counsel have proposed no findings from which a determination can be made on this point. In the case of Farber, for example, this would have been hard to do. The documentary evidence pertaining to Farber's tabloid participation pertains to 1970, while the tabulations of purchases by Gibson stores and Farber's other customers cover the period 1972–1975 (Finding 296).

[114] Respondents urged that these documents could not be so used because of complaint counsel's explanations of

(Continued)

There was insufficient documentary proof of sales to Gibson stores and their competitors with respect to Tucker Manufacturing Corp., Armstrong Environmental Industries and Beagle Manufacturing Company (Findings 168, 316, 368, 369 n. 78).

In the case of Waltham Watch Company, as with a number of other suppliers, the record does not define with sufficient precision the products involved in the alleged discrimination. The Waltham tabulations describe the products sold only as "watches." The record, however, shows that Waltham's watches differ significantly in quality, style and price, among other factors (Findings 255–56, 259).

With regard to the Parker tabulation, there was no adequate showing that the allegedly nonfavored customers functioned at the retail level of operations and, thus, competed with Gibson stores in the resale of Parker products (Finding 166). Similarly, the record is devoid of proof of the functional level of the allegedly nonfavored customers of Comfort (Finding 352). With respect to Waltham, the showing on this point was also weak (Finding 259).

In the case of Unitron, the only documentary evidence concerning sales to Gibson retailers and their allegedly nonfavored competitors is CX 855. This tabulation covers the period 1970 to 1971. But, for that

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their purpose during pretrial. That objection was overruled on March 16, 1978, when the documents were received (Tr. 4588). Moreover, earlier in the trial, on December 7, 1977, respondents recognized that these were "tabulation[s] of disfavored competitors" (Tr. 278). By definition, a "disfavored competitor" is one who is operating at the same functional level as the favored customer and whose purchases are of like grade and quality as those bought by a favored customer. Thus, the purpose for which the tabulations were to be used was clear at the beginning of the trial.

[115] In many instances, that gap was not filled by other evidence.

period, there was no documentary proof of the payment of the 2 1/2% show fee (Finding 337 and note 71).[116] As far as show fees are concerned, no case has been made with respect to Unitron.

In a number of isolated instances, the burden of proof on this point has been met in the case of some suppliers, such as Becker, Wagner,[117] Revell, Unitron as to booth fees, Regal and Farber (Findings 140, 203, 234, 276–77, 298, 337). [192]

The Commission noted in *Weingarten:*

> . . .The evidence adduced in this record in support of the element under consideration is, of course, not totally lacking in probative value, for a good deal of reliable and important information was secured. . . . But the evidence does not quite reach the level of reliability and substantiality necessary for a concrete finding on this particular point.

J. Weingarten, 62 F.T.C. at 1528. That observation is pertinent here. This record demonstrates the validity of the *Weingarten* criteria. As the Fifth Circuit held:

> . . .it seems plain to us that apart from mechanical difficulties, there could hardly be any real problem in getting data as to exact sales and purchases, item by item, made by these suppliers and competitors.

FTC v. *J. Weingarten, Inc.*, 336 F.2d 687, 695 (5th Cir. 1964). "[T]he problem of establishing that the goods sold were of like grade and quality cannot be left to inference." *Castlegate, Inc.* v. *National Tea Company*, 34 F.R.D. 221, 230 (D. Colo. 1963).

C. Knowing Inducement

Complaint counsel must establish that respondents knew or should have known that the payments and services induced and received were not available on proportionally equal terms to their competitors. The evidence need not be direct, and circumstantial evidence permitting the inference that respondents knew or, in the exercise of normal care, should have known of the disproportionality is sufficient. *American News Co.* v. *FTC*, 300 F.2d 104, 110 (2nd Cir. 1962), *cert. denied*, 371 U.S. 824 (1962). See also *R.H. Macy & Co.* v. *FTC*, 326 F.2d 445, 447 (2d Cir. 1964).

Had the show fees and booth fees and other payments been compensation for promotional services in connection with the resale of the goods involved in the discrimination, then the burden would have been met. Respondents initiated the show fees, booth fees and related services which they solicited in connection with the Gibson Trade Show. Basically, Gibson, Sr. fixed the rate for the booth fees and charged whatever the traffic would bear for the show fees (Finding 376). In one instance, a supplier's representative objected that the payments demanded were illegal (Finding 377). Under the circumstances, [193]respondents had sufficient notice to put them under the duty of inquiring as to whether the suppliers were taking steps to make such payments available to other buyers. *Fred Meyer, Inc.*, 63 F.T.C. 1, 59 (1963), *modified on other grounds*, 359 F.2d 351 (9th Cir. 1966), *rev'd*, 390 U.S. 341 (1968). The record is devoid of evidence showing such inquiry by respondents. Failing to take such steps, respondents were chargeable at least with constructive knowledge of the discriminatory nature of the payments induced.

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[116] In fairness, it should be noted that there is proof of booth fee payments by Unitron in 1970-1971 and some evidence meeting the requisite criteria as to competition in the resale of goods of like grade and quality in that period (Findings 326, 327).

[117] The only difference between the Wagner products in question was in color (Hornick 8161, 8164). Color, contrary to respondents' position, does not preclude a finding of like grade and quality where products are otherwise identical. See *Joseph Kaplan*, 63 F.T.C. at 1348, where differences in the pattern of shower curtains were held immaterial.

D. Public Interest

The Robinson-Patman Act was promulgated to foster smaller independent business enterprises because Congress felt that "the buying practices of large retailers, particularly the chain stores . . . were threatening the continued existence of the independent merchant." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 350 (1968). The three "nonfavored" customers testifying herein were Woolworth, TG & Y[118] and Target, all large chain retailers. No independent merchant appeared. The statute does not preclude a finding that a cognizable discrimination exists where a "Woolworth" is the nonfavored customer. Nevertheless, in view of the complete absence of testimony by smaller independent merchants, it is unclear whether the Count I proceedings are entirely consistent with the Congressional intent.

Complaint counsel urge that "[t]he central issue is the inducement of allowances which gives Gibson stores an advantage over nonfavored competitors" (CPF p. 153). They assert, further, that "[t]here is no defense once discriminatory treatment is proved especially when results benefit respondents." *Ibid.* The government's reliance on the testimony of "nonfavored" customers with the size and economic power of Woolworth and the absence of testimony from independent merchants further supports application of the "original sale" doctrine to this case. On the basis of these facts, the existence of discrimination should not mark the end of analysis; rather, it should initiate an examination of the impact of such practices on the marketplace. The economic power of the nonfavored customers, whose testimony has been adduced, argues compellingly for a test under the pricing provisions of the Robinson-Patman Act. Section 2(f) of the statute, unlike Sections 2(d) and 2(e), permits and, in fact, requires an evaluation of the competitive impact of the "advantage" conferred by discriminatory transactions. That approach would harmonize Robinson-Patman enforcement with the general antitrust objective of promoting competition. [194]

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[118] TG & Y is a subsidiary of City Products Corporation which, in turn, is owned by the Household Finance Corp. Household Finance also own other chains, such as White stores, Von's Groceries and Ben Franklin stores (Pettit 4205-06).

IV. The Count III Brokerage Charges

Section 2(c) of the Robinson-Patman Act provides:

> **That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.**

Respondents assert that the jurisdictional requirements of sales in commerce have not been met. Section 2(c) of the Robinson-Patman Act covers the receipt of brokerage in the course of commerce by a person engaged in commerce. The brokers in question were appointed by Ray-O-Vac as its representatives to all the Gibson stores; they were to assist with respect to the servicing of such accounts throughout the United States (CX 154B, 169A–C). The area involved covered some 20 states (Blake 4499). Gibson, Sr., at that time, licensed Gibson Discount Centers in a multistate area. The challenged brokerage payments covered sales to the Gibson stores wherever made. The payments in question met the jurisdictional requirements of the Act. See *Shreveport Macaroni Mfg. Co., Inc.* v. *FTC*, 321 F.2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1969), holding:

> **We do not read the statute to qualify payment in the "course of * * * commerce," once that appears, by a further requirement that the payment be in connection with goods sold in interstate commerce, resold in interstate commerce, or that the competition between competing customers be in interstate commerce where there is ample nexus to interstate commerce in the whole transaction as here. There is no warrant in the law for any such fragmentation.**

Shreveport involved a violation under Section 2(d). However, the commerce requirements under Sections 2(c) and 2(d) are essentially the same. In light of that precedent, it is evident that the jurisdictional requisite of payments made and received in the course of commerce have also been met under Count I. Under both Counts I and III, there is ample nexus to interstate commerce in the whole transaction in the case of the challenged payments. [195]

The statute absolutely bars payments of brokerage by one party in a transaction to the other and by either party to the other's agent. A principal may pay brokerage to his own agent for services rendered. In short, the Act permits a seller to compensate his broker for services actually rendered on the seller's behalf. Direct or indirect payments of commissions or brokerage to a person buying on his own account for resale are, however, banned. *Tillie Lewis Foods, Inc., et al.*, 65 F.T.C. 1099, 1134–35 (1964), *rev'd on other grounds*, 358 F.2d 224 (9th Cir. 1966).

The rule has been stated succinctly by the First Circuit:

> . . . It is plain enough that the paragraph, as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.

Quality Bakers Co. of America v. *FTC*, 114 F.2d 393, 398 (1st Cir. 1940). See also *Southgate Brokerage Co., Inc.* v. *FTC*, 150 F.2d 607, 609 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

Complaint counsel evidently have elected not to try the Count III charges on the theory that H.R. Gibson, Sr., in receiving brokerage or commission payments, was the agent or intermediary of other respondents or nonrespondent franchisees engaged in retail operations.[119] The charges of illegal [196]brokerage involve the receipt of

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[119] Complaint counsel, in replying to Gibson, Sr.'s motion to exclude evidence, explained their theory of the case under Count III as follows:

> . . .we do not intend to attempt to prove that Gibson Senior[1] is a dummy broker under Count III. This is entirely consistent with complaint counsel's position taken in our answer to motions to exclude evidence where it was stated:
>
> > In support of Count III complaint counsel intend to show that the payments in question were made to members of the Gibson organization including H.R. Gibson, Sr. by various manufacturer's representatives and brokers such as Al Cohen. Complaint counsel have never asserted that respondents H.R. Gibson, Sr. and Belva Gibson have made the payments referred to in Count III. Complaint counsel have been consistent on this position throughout the entire pretrial. To the contrary, we intend to show that respondents H.R. Gibson, Sr. and Belva Gibson are a part and parcel of the Gibson organization which receives the payments and that for example, respondent Al Cohen shared his commission with Herbert R. Gibson, Sr. (Answer to Motions to Exclude Evidence p. 2, dated December 1, 1977).
>
> In other words we intend to prove under Count III that they were receiving, not that they were paying illegal brokerage. Count III of the complaint also incorporates paragraphs 1–11 and pursuant to these paragraphs complaint counsel intend to prove that substance and market realities prevail over form and that the reality is that Gibson Senior is still a part and Parcel of the Gibson organization because there is, and has continued since November of 1972 to be a continuing interrelationship between Gibson Senior and Gibson Junior. Complaint counsel submit that this explanation should once and for all satisfy the respondents.
>
> Since complaint counsel have cleared any misunderstandings respondents could reasonably have had as to Count III, respondents' three proposed order paragraphs are improper.

The Order of January 31, 1978, held on the basis of the foregoing:

> Complaint counsel's foregoing outline of the proof they intend to introduce under Count III delineates the

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commissions by Gibson, Sr. from two brokers representing the Ray-O-Vac Company, Barshell, Inc. and Al Cohen Associates, Inc. The status of Gibson, Sr. as a buyer is critical in resolving the Section 2(c) charges in each of the two instances. [197]

The record shows that Jim Miller doing business as Barshell, Inc., a corporation which he wholly owned, had been appointed as a seller's broker by Ray-O-Vac. Miller, who was appointed to represent Ray-O-Vac products to the Gibson stores, held the position for approximately five years in the period 1969-January 1, 1974 (Findings 410, 411, 414). Miller or Barshell split the Ray-O-Vac commission with H.R. Gibson, Sr. (Findings 419–23). One such payment was received in September 1972 (Findings 422–23).

Gibson, Sr. checked Ray-O-Vac's commission statements furnished to Miller in connection with his receipt from Barshell of split commissions based on Ray-O-Vac's sales (Findings 421–22). Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter.

From his review of the commission statements in connection with his demand for rebates, Gibson, Sr. knew or should have known that he was requiring Miller to pass on part of his brokerage fee received from Ray-O-Vac. Knowledge by the buyer that he is receiving brokerage from the seller's broker is not a statutory element of the violation. Nevertheless, it may [198]under certain circumstances be material to determining the nature of the payment. See *Rowe, supra* at 346. Here, Gibson, Sr.'s knowledge of the nature of the payment effectively negates any contention that these gratuities were not, in fact, brokerage passed on by the seller's broker to Gibson, Sr.

The record shows one such payment, on September 23, 1972.[120] At that time, Gibson, Sr. was owner and operator of various retail stores while simultaneously conducting his trade show (Findings 3, 5, 6). This payment to Gibson, Sr., a buyer, was within the absolute prohibition of

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issues on the basis of which the case will be tried and decided. Complaint counsel state "we do not intend to prove Gibson, Sr. is a dummy broker." *It is clear that complaint counsel do not intend to prove under Count III that Gibson, Sr. was an "intermediary or representative" acting for or on behalf of the other respondents.* Rather, they intend to prove that "H.R. Gibson, Sr. and Belva Gibson are a part and parcel of the Gibson organization which receives the payments and that for example, respondent Al Cohen shared his commission with H.R. Gibson, Sr." The agency, through complaint counsel, in this instance has given its statement of the theory on which the case is to be tried. Under the circumstances, there is no justification for the relief sought (emphasis added).

Under the circumstances, for the purposes of the transactions relevant to Count III, a finding that Gibson, Sr. is a buyer is deemed prerequisite to the determination that a law violation has been proven under those allegations.

[120] There is a conflict between the testimony of Miller and one of respondent's trade show buyers as to whether CX 192 represents a split of the Ray-O-Vac commission between Barshell and Gibson, Sr. The testimony that CX 192 represents a three percent show fee on sales of health and beauty aid products owned and warehoused by Miller has been reviewed. See, *e.g.*, Tr. 7532, 7540-43. The testimony of Miller is relied upon in making the finding.

Section 2(c), and within the theory of violation espoused by complaint counsel.

Pursuant to an oral agreement between Al Cohen Associates, Inc. and Gibson, Sr., the former, beginning in January 1974, split his commissions with the latter on Ray-O-Vac purchases by all the Gibson stores. The commissions paid to Gibson, Sr. by Al Cohen were substantial, amounting in 1974 to $174,907.10, and in 1975 to $150,460.93 (Findings 425–29).

In 1974 and 1975, Gibson, Sr. no longer had any ownership interest in any retail operation (Finding 25). In that time period, he cannot be considered a buyer. An agent or intermediary for the buyer cannot lawfully collect brokerage fees directly or indirectly from the seller even where the intermediary performs services for the seller for "'[t]he agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both.'" *Quality Bakers Co. of America*, 114 F.2d at 399; Patman, *Complete Guide to the Robinson-Patman Act*, 109 Prentice Hall Inc. (1963). Moreover, the passing on of brokerage by a buyer's agent or intermediary receiving such commissions to his principals is not prerequisite to a finding of violation under Section 2(c) of the statute. See *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851, 858 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). Nevertheless, complaint counsel did not proceed under Count III on the theory that such payments were made to Gibson, Sr. as an agent or intermediary acting for or on behalf of the Gibson retailing operations. See note 119, *supra*. The complaint against Al Cohen should, accordingly, be dismissed. See *Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971). [199]

Respondents urge that the payments in question fall within the "except for services rendered" proviso of Section 2(c) and that a showing of price discrimination is prerequisite to finding a violation of this section (RPF Sr. pp. 139, 142). These contentions require analysis in light of *FTC* v. *Henry Broch & Co.*, 363 U.S. 166 (1966), and succeeding cases. Respondents' reliance on the "except for services rendered" proviso is misplaced. Gibson, Sr. received such payment in 1972 from Barshell as a buyer, before he had divested himself of his retail assets. The services he rendered in connection with the trade show were, in effect, rendered for himself and, thus, not cognizable under the exception. The fact that the supplier may also have benefited is immaterial. *Southgate*, 150 F.2d at 610.

Hruby Distributing Co., 61 F.T.C. 1437 (1962), and *Empire Rayon Yarn Co., Inc.* v. *American Viscose Corp.*, 364 F.2d 491 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967),[121] raise the question whether respondents here performed a service entitling them to a functional discount which should be evaluated under the pricing provision of the statute irrespective of the form of the payment. In making that determination, the central question is what was the purpose and reason for the concession. *Empire Rayon Yarn Co.*, 354 F.2d at 189. There is no showing that, in connection with the split commissions he received from Barshell, Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. *Cf. Hruby*, 61 F.T.C. at 1446; *Empire Rayon Yarn Co.*, 364 F.2d at 492. Moreover, at Gibson, Sr.'s trade show, participating suppliers had to depend largely on their own personnel or that of their brokers to do the selling (Finding 87). In addition, there is no showing that Gibson, Sr., who operated retail stores in 1969-October 31, 1972, operated at a different functional level which would justify the pricing variations.[122] Further, unlike the [200]customers in *Hruby* and *Empire Rayon*, Gibson, Sr. was regarded as a powerful buyer by the broker who split his commission with him (Finding 418). In light of the foregoing, there is no showing here that Gibson, Sr. performed a distributional service entitling him to a functional discount which should be evaluated under Section 2(a).

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[121] That decision adopted the statutory interpretation set forth in the dissent to *Empire Rayon Yarn Co., Inc.* v. *American Viscose Corp.*, 354 F.2d 182, 188–92 (2nd Cir. 1965).

Gibson, Sr. pocketed the split commission based on the purchases of all Gibson stores. No finding can therefore be made that the payments were immune from Section 2(c) because they were part of a "worthy effort" on behalf of retailers "to reduce the ultimate sales prices to the consumer" by entering into arrangements making them stronger in their competition with large chain stores. *Cf. Central Retailer-Owned Grocers Inc.* v. *FTC*, 319 F.2d 410, 415 (7th Cir. 1963). There is no evidence that the split commissions received by Gibson, Sr. strengthened the competitive position of the nonfamily franchised stores in any way.

Applying the "purpose and effect" test to the payment,[123] it is significant that Ray-O-Vac did not discuss with its brokers their passing on of brokerage to Gibson, Sr. (Finding 424). Accordingly, Ray-O-Vac's broker chose to split his commission with Gibson, Sr. in transactions which may not have been known to the broker's principal, the supplier. This militates against any finding that the split brokerage constituted a functional discount for distributional services. Rather, this is precisely the kind of transaction which Section 2(c) was designed to reach in order to force hidden price discriminations into the open. [201]

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[122] *Cf. Hruby*, 61 F.T.C. at 1446:

> In its Section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices. The lawfulness of such functional price differences derives from the fact that they result in no adverse economic effects upon particular competitors or competition in general. Thus, since Hruby operates at a higher competitive or functional level than wholesalers, the granting to Hruby or receipt by him of a lower price than afforded to wholesalers would ordinarily not be questioned. But the manner and form in which Hruby received his lower prices created the doubts concerning their validity which led to this complaint.

[123] See *Empire Rayon Yarn Co.*, 354 F.2d at 189.

In summary, developments under Section 2(c) since *Broch* do not warrant an exception to the rule of *Southgate* in this proceeding.

Even if the "except for services rendered" proviso were available under these circumstances, the burden would still be on respondents to establish it. The provision would become a sham unless those seeking to take advantage of it established the value in concrete terms of the services rendered in relation to the commission payments received. In addition to a claim that brokerage was paid for services rendered, there must be a showing that the distribution costs saved justified the amount of the allowance. No such showing has been made here and respondents' reliance on the provision is rejected.[124]

[202]The Supreme Court's *Broch* decision does not stand for the proposition that price discrimination is prerequisite to a finding of violation in each Section 2(c) case. The prior Supreme Court decision in *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959), distinguishing Sections 2(c), (d) and (e) from the pricing provisions of the Act, indicates that *Broch* imposed no universal requirement that price discrimination must be proven in each 2(c) case. As the Court stated, while holding Section 2(b) inapplicable in a 2(e) proceeding:

> *Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations.* * * * In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition (emphasis added).

360 U.S. at 65.

Neither the text of Section 2(c) nor the statutory context of that section requires that it be limited to instances of price discrimination. *Rangen Inc.*, 351 F.2d at 856. In light of *Broch*, the element of price discrimination may be helpful under certain circumstances in determining whether a payment was made in "lieu of brokerage." However, the holding on this point does not apply to cases, such as the instant proceeding, involving the outright payments of unearned brokerage by a seller's broker to a buyer. As the Ninth Circuit held in *Rangen:*

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[124] Implicit in the *Broch* dicta concerning the "except for services rendered" proviso is a requirement that the party asserting the defense demonstrate that the services in question gave rise to sufficient cost savings to warrant the reduction in brokerage. In this connection, the Court stated in pertinent part:

> We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. *There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge.* We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances. *One thing is clear — the absence of such evidence and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated* (emphasis added).

363 U.S. at 173-74.

> There has been some speculation that the Broch case may have superimposed a requirement of price discrimination on section 2(c). Rowe, Price Discrimination Under the Robinson-Patman Act 344–45 (1962); Federal Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 189, 80 S.Ct. 1158 (dissenting opinion). However, discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage transaction; and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage.

351 F.2d at 858.

The Count III allegations against H.R. Gibson, Jr. and Gerald Gibson have not been sustained. Complaint counsel apparently intended to tie these respondents to the receipt of illegal brokerage by showing that they had stock ownership in a manufacturer's representative, Jim Miller Sales Company, [203]another firm owned by Jim Miller (Tr. 3629–31).[125] Two of complaint counsel's nonrespondent witnesses should have had firsthand knowledge of such transactions, if they took place. One was Omer Nix, the other was Jim Miller. Complaint counsel struck Omer Nix from their witness list after he had declined to respond to two subpoenas during the course of trial and failed to appear for a deposition scheduled for the pretrial. Jim Miller appeared and testified but was asked no questions concerning this matter. The record gives no indication why Miller was not questioned on this subject. Under the circumstances, these respondents are entitled to the application of the adverse inference rule, for:

> The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Clifton v. United States, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. Runkle v. Burnham, 153 U.S. 216, 225; Kirby v. Tallmadge, 160 U.S. 379, 383; Bilokumsky v. Tod, 263 U.S. 149, 153, 154; Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 111, 112; Mammoth Oil Co. v. United States, 275 U.S. 13, 52; Local 167 v. United States, 291 U.S. 293, 298.

Interstate Circuit v. *U.S.*, 306 U.S. 208, 226 (1939). The Count III allegations as to H.R. Gibson, Jr. and Gerald Gibson will be dismissed. Similarly, the allegations under this count should also be dismissed as to the other respondents, with the exception of Gibson, Sr., since the evidence fails to link them with these practices.

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[125] Complaint counsel expected to prove that H.R. Gibson, Sr. owned fifty percent of the stock in Jim Miller Sales Company, a manufacturer's representative, which he subsequently gave to his sons, Gerald and Herbert, Jr. (Tr. 3629). Jerry Moland testified that Gerald Gibson, in 1967 or 1968, had admitted such facts to him (Tr. 3694). Complaint counsel apparently relied on Omer Nix to testify that this transaction continued in the relevant period 1969–1975 (Tr. 3629–30).

V. The Boycott Allegations

The purpose of the Gibson Trade Show was to make money (Leverett 3800), and suppliers who refused to pay a show fee were not permitted to participate therein (Leverett 3792, 3812).

In at least three instances, suppliers who refused to make the trade show payments that had been demanded of them were excluded from further participation in the shows. Subsequent to such exclusions, letters were sent out by trade show or "Seagoville" buyers to "All Stores" stating that the company would not "sell us at a price we would recommend as being profitable and beneficial for your operation." The letters [204]continued that such lines were no longer recommended or authorized and suggested that the stores discontinue them. They concluded with the request that this be given attention coupled with an expression of appreciation for the stores' continued cooperation. These letters, dealing with the Toastmaster Division of the McGraw-Edison Company, Tucker Manufacturing Corporation and Jeannette Glass Company, were sent out in January and March 1971 (CX 104, 136, 303).

The letter by two Seagoville Buyers, Tommy Perkins and Bobby Regeon, requesting the Gibson stores to discontinue Toastmaster purchases, was sent in January 1971. The record shows that Toastmaster's sales volume to the various Gibson stores in 1970 amounted to $953,656.53, and dropped to $296,778.33 in 1971. Corresponding sales figures for the territories of individual sales personnel showed similar declines (Finding 390; CX 116A, C, 117A–D).

CX 104 was written and mailed out (Findings 388, 389, note 129, *infra)*. The parties disagree as to the motive for the letter, the extent of its dissemination and whether it was acted upon. One of the signatories to CX 104 explained that the letter was written so that the trade show would not be blamed by its customers for problems they were experiencing with Toastmaster (Regeon 6639, 6643).[126] The testimony is not persuasive. The explanation is inconsistent with the plain meaning of the contemporaneous document. Moreover, the witness claimed that CX 104 arose out of "a very unusual situation" (Tr. 6639). However, the letters in question, sent out by the trade show, also use essentially the same boilerplate language in the case of Jeannette and Tucker. It is inherently unlikely that CX 104 was written because of problems unique to Toastmaster when identical letters were employed in the case of two other manufacturers who similarly refused to make show fee payments. The logical inference is that in all three [205]instances trade show personnel requested the Gibson stores to discontinue purchases because of a failure or refusal to pay the trade show fees.[127]

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[126] The witness explained the difficulties he had experienced with Toastmaster, which impelled the writing of this letter, as follows:

> We had a lot of problems in getting merchandise shipped, especially into the metropolitan areas around Christmas time, as they just wouldn't ship the merchandise in. They just wouldn't get it in there. Of course I know that they had some distributors in the area, and maybe they wanted to protect their distributors. But I know that we could not get merchandise, and numerous customers called in complaining about it, and that's the reason I put the letter out, because I didn't want the trade show to be blamed for the problems that were happening with Toastmaster (Regeon 6639. See also Low 7735–37, 7552–57).

There is also the testimony by one of the signatories to CX 104 that, after sending the letter, he did not expect or anticipate that franchisees would drop the Toastmaster line (Regeon 6643). This testimony also conflicts with the plain meaning of the contemporaneous document which is studded with phrases such as that Toastmaster would not sell at a price "We would recommend as being profitable and beneficial for your operation" and that the buyers no longer "recommend" or "authorize" the line and "suggest that you discontinue the same." The stores are asked to give this matter their "attention" and are assured that "We appreciate your continued cooperation." The suggestion that stores discontinue purchases, coupled with the request that the stores give this matter their attention and cooperation can be construed only one way. The authors of the letter wrote it with the expectation that the recipients would discontinue purchasing from Toastmaster.

Similarly, testimony by respondents' employees that the letter was only sent to a limited class of Gibson retailers is unconvincing. There are conflicts in the testimony on this point. See note 129, *infra*. Moreover, it is unlikely that CX 104 was sent only to those Gibson stores complaining about Toastmaster since the letter employed language essentially identical to the letters sent in the case of Jeannette Glass Company and Tucker Manufacturing Company. The record, as a whole, compels the finding that "All Stores" on CX 104 means all stores operating under the Gibson name.[128]

[206]Respondents' explanation that retailer dissatisfaction with Toastmaster shipments gave rise to the writing of CX 104 must be

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[127] As one of respondent's employees, Bobby Regeon, stated, the "Number one" reason for writing CX 104 was that Toastmaster would not pay its show fee (Tr. 6706):

> Q. If you were having these problems with the Toastmaster line, why did you send the letter out when they were no longer in the show? Why did you wait until January to do that?
>
> A. Number one, they wouldn't pay their trade show fee; number two, we had problems, and I did not want the Gibson Trade Show to be blamed for the problems.

[128] In this connection, see CX 27, a letter dated July 31, 1972 from H.R. Gibson, Sr. to "H.R. GIBSON STORES (also for information of all stores)." This letter demonstrates that "all stores" means what it says; if limited distribution of such a letter were intended, it would be indicated on the face of the letter.

rejected for the reasons stated. The record, accordingly, does not support a finding that Toastmaster's drastic decline in sales to the Gibson stores in 1971 resulted from business reasons, such as customer dissatisfaction, independent of the appeal to boycott in CX 104.

Certain franchisees testified that they had not received CX 104 or similar letters from the trade show.[129] However, on the facts of this case, there is no need to show that specific retailers stopped or diminished their purchases from Toastmaster in response to CX 104. The precipitous sales drop of Toastmaster to the Gibson stores, from $953,656 in 1970 to $296,778 in 1971, [207]compels the inference that the letter requesting the Gibson stores to boycott Toastmaster was received and acted upon by a substantial number of stores.[130]

In summary, CX 104 was a request by respondents that the Gibson stores boycott Toastmaster. The letter to "All Stores" requesting their "attention" and "cooperation" clearly contemplated concerted action by the recipients and must have been so construed by them. The extent of the drop in Toastmaster's sales in 1971 to the Gibson stores demonstrates that a substantial number of stores participated in the combination. The necessary consequences of such a combination are to diminish the suppliers' freedom to sell to retailers and to curtail the retailers' choice of the suppliers with whom they may deal.

The allegations under Count II of the complaint have been sustained.

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[129] The testimony does not preclude a finding of a combination in restraint of trade. Significantly, one of respondents' franchisee witnesses was unable to recall whether or not he received CX 104, 136 and 308 (McCrea 6828–29). Moreover, one of respondents' employees conceded that the letters were mailed to "HRG" stores, while the other signatory to CX 104 admitted that the letter had been sent to customers in the metropolitan areas making complaints about Toastmaster (Perkins 3832–33; Regeon 6710–11). Regeon's admission that, before taking the stand, he had stated to complaint counsel that the letter had been sent to the trade show customers generally detracts from the weight of his testimony that the distribution was limited:

> Q. Do you recall I asked you regarding "all stores"? And do you remember when I asked you what "all stores" referred to in regard to this letter, you indicated that it referred to all Gibson Trade Show customers?
>
> * * * * * * *
>
> [Question read by reporter]
>
> A. Yes, I did.
>
> Q. When I asked you what you meant by that, do you recall saying "all retail stores attending the trade show"?
>
> A. I believe I said "all Gibson Trade Show customers."
>
> Q. And that would be all of the retail stores attending the Gibson Trade Show would be the customers of the Gibson Trade Show?
>
> A. Any customer of the Gibson Trade Show, whether he was a Gibson store or otherwise (Regeon 6711–12).

[130] This alone is sufficient to support a finding of unlawful combination. That finding is further corroborated by the testimony of Henry May, a Toastmaster sales representative. May, after Toastmaster received notice of CX 104, was informed by Roy Love, an Oklahoma City franchisee who was also Gibson Sr.'s brother-in-law, that if he wanted to keep the Gibson sign, Love had to go by what Seagoville told him to do. Love had received CX 104 (Tr. 3466; Finding 389). And, in January or February 1971, May saw CX 104 in a Fort Worth Gibson store (Finding 388). The finding concerning the Fort Worth store is made taking into consideration the conflict with another witness on this point (See Tr. 7807–09). The May testimony is further corroborated by the contemporaneous memorandum of another salesman in February 1971, concerning a Columbia, Mo. Gibson store, stating that he had been informed by one Ed Drewel of this store "that they were going along with Gibson Hqs. instructions not to purchase Toastmaster" (Finding 389).

The Commission need not establish an express agreement to boycott. A combination or conspiracy may be found in a course of dealing or other circumstances; a formal agreement or exchange of words is not necessary. *Fort Howard Paper Co.* v. *FTC*, 156 F.2d 899, 905 (7th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946); *American Tobacco Co.* v. *U.S.*, 328 U.S. 781, 809–10 (1946). Business behavior is admissible circumstantial evidence from which agreement may be inferred. See *Interstate Circuit* v. *U.S.*, 306 U.S. 208 (1939). And, an agreement may be implied from a contemplated pattern of conduct. It is enough that concerted action is contemplated and that those invited to do so give their adherence to the scheme and participate therein. *Id.* at 226. Further, an unlawful conspiracy may be formed without simultaneous action or agreement by the conspirators. *Id.* at 227. [208]

Respondents assert that they were concerned that shipment problems with Toastmaster stemmed from the supplier's desire to protect certain of its distributor customers from price competition with the Gibson stores. Even if these contentions were accepted for the sake of argument, they would not constitute a defense to the group boycott initiated by CX 104. Group boycotts and concerted refusals to deal are *per se* illegal. Allegations that they were reasonable in specific circumstances is no defense. Nor are they saved by a failure to show adverse economic affect or actual restraint on competition. *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 468 (1941).

The fact that not all stores may have participated in the boycott and that some stores continued to purchase from Toastmaster is immaterial. A combination is unlawful even though it may not as yet have resulted in a restraint. And, an agreement to follow a course of action which would necessarily restrain or monopolize a part of commerce violates the Sherman Act whether "'wholly nascent or abortive on the one hand, or successful on the other.'" *Associated Press* v. *U.S.*, 326 U.S. 1, 12 (1945). Moreover, it is the object of the Federal Trade Commission Act to reach in their incipiency combinations which could lead to trade restraints or other unfair practices. *Fashion Originators' Guild*, 312 U.S. at 466. The Commission under Section 5 of the Federal Trade Commission Act has the power to arrest trade restraints in their incipiency without proof that they amount to an outright violation of the provisions of other antitrust laws. *FTC* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966).

The interrelationship of the respondents herein and their various affiliates does not preclude a finding of conspiracy. Parties closely affiliated with each other such as parent companies, their affiliates, as well as their officers and directors, are not immune from conspiracy charges merely by virtue of their relationship. *Schine Theatres* v. *U.S.*, 334 U.S. 110, 116 (1948); *U.S.* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); *Timken Co.* v. *U.S.*, 341 U.S. 593, 598 (1951).

Finally, coming to the question of remedy, it is immaterial whether or not the individual respondents such as Gibson, Sr. gave the trade show buyers express authority to write letters such as CX 104. In this case, the record shows that the trade show buyers had broad authority to deal with suppliers and Gibson retailers in connection with their trade show functions. The writing of CX 104 was directly related to their principals' business. Accordingly, the principals, such as Gibson, Sr., are bound by their employees' or agents' unlawful acts in [209] instigating combinations or agreements to boycott. See *Continental Baking Company* v. *U.S.*, 281 F.2d 137, 149–50 (6th Cir. 1960). Under such circumstances, the principals must stand or fall with those they select to act for them. The failure of the principals, in such a case, to prevent the illegal acts of their agents constitutes the nonperformance of a nondelegable duty. *Id.* at 150; *U.S.* v. *Armour & Co.*, 168 F.2d 342, 344 (3d Cir. 1948).

In the period 1970–1971, respondents Gibson, Sr., Belva Gibson, Herbert Gibson, Jr. and Gerald Gibson represented through the Store Directories that they were, respectively, Chairman of the Board, Secretary, President and Executive Vice President of Gibson Products Company, 519 Gibson Street, Seagoville, Texas, and that the individuals listed as "Home Office" personnel or as "Buyers" were under their control and acted on their behalf (Findings 39–41). CX 104, under the Gibson Products Company letterhead, was within the scope of the apparent authority conferred by the individual respondents. Accordingly, all are liable for the buyers' acts in that period even though no express authority had been conferred and regardless of whether their own stores continued to buy from Toastmaster or not. In the case of Gibson, Sr., moreover, liability by way of apparent authority for the illegal acts may be found from the employment relationship alone.

An order to prohibit the practice will issue.

REMEDY

The violations found under Counts II and III of the complaint occurred prior to Gibson, Sr.'s divestiture of his retail assets to his sons on October 31, 1972. As respondents assert, after the divestiture of such assets, there is little or no evidence of control by Gibson, Sr. over Gibsons Inc. or its subsidiaries, including the retail operations. Nevertheless, the Gibson Trade Show continued to be oriented to those retailers operating under the Gibson name. No finding can be made that the tie was completely broken.

In any event, there is no assurance that the practices in question have been surely stopped. In connection with the Section 2(c) violation, the payments received from Al Cohen were not within the scope of the theory of the case as it was tried. However, the payments by Cohen in 1974 and 1975 bore a distinct resemblance to the Section 2(c) violations found in connection with Barshell. In the case of the boycott violations, it is significant that the licensing agreement in effect since [210]October 31, 1972, under which Gibson Discount Centers, Inc. licensed various franchisees, continued to contain provisions whereunder the licensor promised merchandising advice to the licensees and reserved the right in his sole discretion to determine whether the goods and services of the licensed stores were of acceptable quality (Findings 51–54). Whether or not the powers conferred by those provisions have, in fact, been exercised, respondents' latent power to control the purchasing decisions of the franchisees continues. An order will issue to preclude both further violation of Section 2(c) of the Robinson-Patman Act and group boycotts by the respondents.

Although the evidence may be old, this does not *per se* mean that an order based upon it is vitiated. Where a law violation has been proven against an enterprise and is capable of being perpetuated or resumed, it may be presumed that it has continued. An order may issue to prevent it even upon a showing of discontinuance or abandonment. *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 275 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970).

The mutual interdependence of the respondents, at least in the period 1969–October 31, 1972, compels the finding that the Gibson individual and corporate respondents operated an integrated business (pp. 174–76 *supra*). Under the circumstances, to prevent circumvention, an order may issue against all whether or not each engaged in the prohibited conduct. *Sunshine Art Studio Inc.* v. *FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Delaware Watch Company* v. *FTC*, 332 F.2d 745 (2nd Cir. 1964). Accordingly, the provisions of the order dealing with the boycott violation will run against all the Gibson respondents. The exception is Gibsons Inc., which was not in existence at the time that the boycott violations took place in 1970–1971.

The order, in addition to prohibiting the boycott violations found, will also prohibit future use of licensing or franchising agreements which contain provisions for giving merchandising advice to franchisees or permit respondents to control the quality of merchandise sold and the services rendered by the licensees. CX 104, the letter giving rise to the illegal combination, on its face constituted merchandising advice. This prohibition will prevent respondents from indirectly achieving the result prohibited by the order provision against boycotts. The Commission may prohibit practices which are related to the unlawful practices found to exist so as to make the order effective. *Jacob Siegel* v. *FTC*, 327 U.S. 608 (1946); *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957). For, it is obliged "not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices." *Id.* at 430. [211]In view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right.

Respondents' operation as an integrated enterprise, at least in the period 1969-October 31, 1972, does not, in the case of the Section 2(c) violation, justify the imposition of an order against all respondents. In this respect, complaint counsel's failure to question the broker, Jim Miller, concerning the respondents other than Gibson, Sr. compelled the inference that such evidence would have been adverse (see pp. 202-03 *supra*). The provisions in the order dealing with the receipt of brokerage will be limited to Gibson, Sr.

Complaint counsel also ask for restrictions on the Gibson Trade Show, such as a five year moratorium on its operations and a ban on trade show profits when it is resumed. These provisions cannot be justified since the allegations under Count I alleging the discriminatory receipt of promotional allowances have not been sustained.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondents:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva Gibson
Gerald Gibson
Gibsons Inc.
Gibson Discount Centers, Inc.
Ideal Travel Agency, Inc.
Gibson Warehouse, Inc.
Gibson Products Co., Inc.
Al Cohen Associates, Inc.

2. This proceeding is in the public interest.
3. The allegations under Count I of the complaint have not been sustained.

4. The aforesaid acts and practices of the respondents as herein found under Count II of the complaint were and are to the prejudice and injury of the public and constituted and now constitute unfair acts and practices and unfair methods of competition in and affecting commerce within the intent and meaning of the Federal Trade Commission Act.

5. The aforesaid acts and practices of respondent H.R. Gibson, Sr. as herein found under Count III of the complaint were and are to the prejudice and injury of the public and constitute violations of Section 2(c) of the Robinson-Patman Act. [212]

ORDER

It is ordered, That respondents Herbert R. Gibson, Sr., Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc. their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation of any retailing business, or the operation of any business related to retailing in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to boycott or eliminate any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation.
2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any person, partnership or corporation.
3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any retailer, or any person, partnership or corporation.
4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation when such supplier does not utilize the services of the Gibson Trade Show or appear in shows conducted by the Gibson Trade Show.
5. Utilizing franchising or licensing agreements containing (a) provisions whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold

and services rendered by such licensees or franchisees. *Provided, however*, that this provision shall not apply to those retail operations wholly owned by respondent Gibson's Discount Centers, Inc. [213]

It is further ordered, That H.R. Gibson, Sr., individually, and his officers, agents, representatives and employees, directly or through any corporate or other device in connection with the purchase of merchandise in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Receiving or accepting directly or indirectly from any seller anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names such as "Gibson Discount Center."
2. Assuming control of or influencing any seller's broker to induce such broker to pay him anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names such as "Gibson Discount Center."

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

It is further ordered, That Count III of the complaint be, and it hereby is, dismissed as to respondents Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, Gibsons Inc., Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., Gibson Products Co., Inc. and Al Cohen Associates, Inc.

It is further ordered, That, for a period of 10 years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [214]

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the order.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Gibson Discount Centers, Inc.
The Incorporators of
the Corporation
on or about September 17, 1969

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Gerald Gibson (CX 2L) [ii]

Gibson Discount Centers, Inc.

Directors

On September 17, 1969, the names and addresses of the first Board of Directors of respondent Gibson's Discount Centers, Inc. were:

Names	Addresses
Herbert R. Gibson, Sr.	519 Gibson Street Seagoville, Texas
Mrs. H.R. Gibson, Sr.	519 Gibson Street Seagoville, Texas
Herbert R. Gibson, Jr.	519 Gibson Street Seagoville, Texas
Gerald Gibson	6814 Alexander Drive Dallas, Texas
Richard Gibson	2100 South Mobberly Longview, Texas

(CX 2, p. 9)

Elected at the annual meeting of the shareholders on April 7, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson
Richard Gibson
Gerald Gibson

(CX 1274)

Elected at the annual meeting of the shareholders on April 8, 1972:

Herbert R. Gibson, Sr.
Herbert R. Gibson, Jr.
Belva G. Gibson
Richard Gibson
Gerald Gibson

(CX 1275)

Elected at the annual meeting of the shareholders on April 9, 1973:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 1276A)

Officers

Elected at the annual meeting of the Board of Directors on April 7, 1971:

H.R. Gibson, Sr.	Chairman of the Board
H.R. Gibson, Jr.	President
Belva G. Gibson	Vice President
Richard Gibson	Vice President
Gerald Gibson	Scretary-Treasurer

(CX 1277A)

Elected at the annual meeting of the Board of Directors on April 8, 1972:

H.R. Gibson, Sr.	Chairman of the Board
H.R. Gibson, Jr.	President
Belva G. Gibson	Vice President
Richard Gibson	Vice President
Gerald Gibson	Secretary-Treasurer

(CX 1278) [iii]

Elected at the annual meeting of the Board of Directors on April 9, 1973:

H.R. Gibson, Jr.	President
Gerald P. Gibson	Vice-President
B.R. Mercer	Secretary-Treasurer
Robert E. Rader, Jr.	Asst. Secretary

(CX 1279)

Directors

Elected at the annual meeting of the shareholders on April 2, 1974:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 994)

Elected at the annual meeting of the shareholders on April 17, 1975:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 998)

Officers

Elected at the annual meeting of the Board of Directors on April 2, 1974:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
B.R. Mercer	Secretary-Treasurer
Robert E. Rader, Jr.	Asst. Secretary
J.W. Carter	Asst. Secretary

(CX 996)

Elected at the annual meeting of the Board of Directors on April 17, 1975:

H.R. Gibson, Jr.	President
Gerald P. Gibson	Vice-President
B.R. Mercer	Secretary-Treasurer

(CX 998) [iv]

Gibson Warehouse, Inc.

The initial board of directors in May 1962 was:

H.R. Gibson, Sr.	6814 Alexander Drive	Dallas, Texas
Belva Grace Gibson	6814 Alexander Drive	Dallas, Texas
H.R. Gibson, Jr.	519 Gibson Street	Seagoville, Texas

(CX 4C) [v]

Gibson Warehouse, Inc.

Directors

Elected at the annual meeting of the shareholders on June 8, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson

(CX 1295)

Elected at the annual meeting of the shareholders on June 12, 1972:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson

(CX 1296)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1297)

Officers

Elected at the annual meeting of the Board of Directors on June 8, 1971:

H.R. Gibson, Sr.	President
H.R. Gibson, Jr.	Vice-President
Belva G. Gibson	Secretary-Treasurer

(CX 1299)

Elected at the annual meeting of the Board of Directors on June 12, 1972:

H.R. Gibson, Sr.	President
H.R. Gibson, Jr.	Vice-President
Belva G. Gibson	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1300)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill R. Mercer	Secretary-Treasurer

(CX 1301A)* [vi]

---

* H.R. Gibson, Sr. and Belva tendered their resignations as officers and directors on October 31, 1972 (CX 1301B, 1301D).

Ideal Travel Agency, Inc.

The initial board of directors on or about April 19, 1962:*

H.R. Gibson	6814 Alexander Drive	Dallas, Texas
Belva Grace Gibson	6814 Alexander Drive	Dallas, Texas
W.C. Greer	519 Gibson Street	Seagoville, Texas [vii]

(CX 3C)

---

* At that time Gibson Travel Service.

Ideal Travel Agency, Inc.

Directors

Elected at the annual meeting of the shareholders on April 15, 1970:

H.R. Gibson, Sr.
Roy R. Love
Belva Gibson

(CX 1282)

Elected at the annual meeting of the shareholders on April 15, 1971:

H.R. Gibson, Sr.
Roy R. Love
Belva Gibson

(CX 1283)

Elected at the annual meeting of the shareholders on April 14, 1972:

H.R. Gibson, Sr.
Belva Gibson
H.R. Gibson, Jr.

(CX 1284)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1285)

Officers

Elected at the annual meeting of the Board of Directors on April 15, 1970:

H.R. Gibson, Sr.	President
Roy R. Love	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1287)

Elected at the annual meeting of the Board of Directors on April 15, 1971:

H.R. Gibson, Sr.	President
Roy R. Love	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1288)

Elected at the annual meeting of the Board of Directors on April 14, 1972:

H.R. Gibson, Sr.	President
Belva Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1289)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1290A)* [viii]

---

* Belva Gibson and H.R. Gibson, Sr. resigned as officers and directors of the corporation on October 31, 1972 (CX 1290C, 1290E).

Gibson Products Company

Directors

Elected at the annual meeting of the shareholders on December 1, 1970:

H.R. Gibson, Sr.
Belva Gibson
Betty Rogers

(CX 1308, 1411A)

Elected at the annual meeting of the shareholders on December 8, 1971:

H.R. Gibson, Sr.
Belva Gibson
H.R. Gibson, Jr.

(CX 1309)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1310)

Elected at the annual meeting of the shareholders on December 19, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill R. Mercer

(CX 1311)

Officers

Elected at the annual meeting of the Board of Directors on December 1, 1970:

H.R. Gibson, Sr.	President
Betty Rogers	Vice-President
Belva Gibson	Secretary-Treasurer
Gerald P. Gibson	Asst. Secretary

(CX 1313)

Elected at the annual meeting of the Board of Directors on December 8, 1971:

H.R. Gibson, Sr.	President
Belva Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1314)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Sr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1315A)[*]

Elected at the annual meeting of the Board of Directors on December 19, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill R. Mercer	Secretary-Treasurer

(CX 1316) [ix]

Gibson Products Company

Directors

Elected at the annual meeting of the shareholders on December 4, 1973:

H.R. Gibson, Jr.
Gerald Gibson
B.R. Mercer

(CX 1312) [x]

Officers

Gibson Products Company of San Antonio, Inc.

Directors

Elected at the annual meeting of the shareholders on June 2, 1970:

H.R. Gibson, Jr.
Belva Gibson
Sarah Wheat

(CX 1349)

Officers

Elected at the annual meeting of the Board of Directors on June 2, 1970:

H.R. Gibson, Jr.	President
Sarah Wheat	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1350)

---

[*] H.R. Gibson, Sr. and Belva Gibson resigned as officers and directors of the company on October 31, 1972 (CX 1315B, 1315D).

Directors

Elected at the annual meeting of the shareholders on June 2, 1971:

H.R. Gibson, Jr.
Belva Gibson
Sarah Wheat

(CX 1348)

Elected at the annual meeting of the shareholders on June 12, 1972:

H.R. Gibson, Jr.
Belva Gibson
Gerald Gibson

(CX 1346)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1344A)

Officers

Elected at the annual meeting of the Board of Directors on June 2, 1971:

H.R. Gibson, Jr.	President
Sarah Wheat	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1347)

Elected at the annual meeting of the Board of Directors on June 12, 1972:

H.R. Gibson, Jr.	President
Gerald P. Gibson	Vice-President
Belva Gibson	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1345)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1344B)* [xi]

---

* Belva Gibson resigned as an officer and director of the corporation on October 31, 1972 (CX 1344C).

Gibson Products Company, Inc. of Garland

Directors

Elected at the annual meeting of the shareholders on February 10, 1971:

H.R. Gibson, Sr.
Gerald Gibson
H.R. Gibson, Jr.

(CX 1365)

Elected at the special meeting of the shareholders on November 8, 1972:

H.R. Gibson, Jr.
Gerald Gibson
B.R. Mercer

(CX 1359)

Officers

Elected at the annual meeting of the Board of Directors on February 10, 1971:

H.R. Gibson, Sr.	President
Gerald P. Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer

(CX 1364A)

Elected at the annual meeting of the Board of Directors on February 14, 1972:

H.R. Gibson, Sr.	President
Gerald P. Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1363)

Elected at the special meeting of the Board of Directors on November 8, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1360)* [xii]

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* H.R. Gibson, Sr. tendered his resignation as President and Director of the Corporation on October 31, 1972 (CX 1361).

Gibson Products Company, Inc. of Richardson

Directors

Elected at the annual meeting of the shareholders on February 2, 1970:

H.R. Gibson, Jr.
H.R. Gibson, Sr.
J.H. Acklin

(CX 1883)*

Elected at the annual meeting of the shareholders on February 3, 1971:

H.R. Gibson, Jr.
H.R. Gibson, Sr.
J.H. Acklin

(CX 1882)

Elected at the annual meeting of the shareholders on February 8, 1972:

H.R. Gibson, Jr.
J.H. Acklin
H.R. Gibson, Sr.

(CX 1880)

Elected at the special meeting of the shareholders on November 8, 1972:

H.R. Gibson, Jr.
J.H. Acklin
Bill Mercer

(CX 1876)**

Officers

Elected at the annual meeting of the Board of Directors on February 3, 1970:

H.R. Gibson, Jr.	President
J.H. Acklin	Vice-President
H.R. Gibson, Sr.	Secretary-Treasurer

(CX 1884)

Elected at the annual meeting of the Board of Directors on February 3, 1971:

H.R. Gibson, Jr.	President
J.H Acklin	Vice-President
H.R. Gibson, Sr.	Secretary-Treasurer

(CX 1881)

Elected at the annual meeting of the Board of Directors on February 8, 1972:

H.R. Gibson, Jr.	President
J.H. Acklin	Vice-President
H.R. Gibson, Sr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1879)

Elected at the special meeting of the Board of Directors on November 8, 1972:

H.R. Gibson, Jr.	President
J.H. Acklin	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1875) [xiii]

Gibson Products Company of Shreveport, Inc.

Directors

Elected at the annual meeting of the shareholders on October 5, 1970:

H.R. Gibson, Sr.
Barbara Gibson
Gerald Gibson

(CX 1897)

Elected at the annual meeting of the shareholders on October 5, 1971:

H.R. Gibson, Sr.
Barbara Gibson
Gerald Gibson

(CX 1895)

Officers

Elected at the annual meeting of the Board of Directors on October 5, 1970:

Gerald Gibson	President
H.R. Gibson, Sr.	Vice-President
Barbara Gibson	Secretary-Treasurer
H.R. Gibson, Jr.	Asst. Secretary-Treasurer

(CX 1896)

Elected at the annual meeting of the Board of Directors on October 5, 1971:

Gerald Gibson	President
H.R. Gibson, Sr.	Vice-President
Barbara Gibson	Secretary-Treasurer
H.R. Gibson, Jr.	Asst. Secretary-Treasurer

(CX 1894)

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* One of the shareholders constituting the quorum at this meeting was Belva G. Gibson (CX 1888).

** On October 31, 1972, H.R. Gibson, Sr. tendered his resignation as officer and director of the corporation (CX 1877).

Directors

Elected at the annual meeting of the shareholders on October 3, 1972:

Barbara Gibson
H.R. Gibson, Jr.
Gerald Gibson

(CX 1393)

Officers

Elected at the annual meeting of the Board of Directors on October 3, 1972:

Gerald Gibson	President
Barbara Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1392) [xiv]

Gibson Products Company, Inc. of Plano

Directors

Elected at the annual meeting of the shareholders on April 28, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva Gibson

(CX 1410)

Elected at the annual meeting of the shareholders on October 26, 1971:

H.R. Gibson, Jr.
Gerald Gibson
Belva Gibson

(CX 1408)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1406B)

Officers

Elected at the annual meeting of the Board of Directors on April 28, 1971:

H.R. Gibson, Sr.	President
H.R. Gibson, Jr.	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1409)

Elected at the annual meeting of the Board of Directors on October 26, 1971:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Jack Weinblatt	Vice-President
Belva Gibson	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1407)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Jack Weinblatt	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1406A)*

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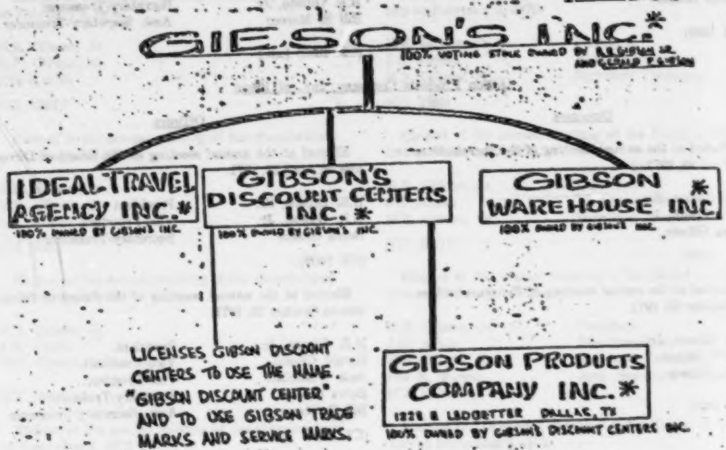
* On October 13, 1972, Belva Gibson submitted her resignation as an officer and director of this corporation (CX 1406C).

APPENDIX 8


GIBSON'S INC.*
100% VOTING STOCK OWNED BY H.R. GIBSON JR. AND GERALD P. GIBSON
IDEAL TRAVEL AGENCY INC.*
100% OWNED BY GIBSON'S INC.
GIBSON'S DISCOUNT CENTERS INC.*
100% OWNED BY GIBSON'S INC.
GIBSON WAREHOUSE INC.*
100% OWNED BY GIBSON'S INC.
LICENSES GIBSON DISCOUNT CENTERS TO USE THE NAME "GIBSON DISCOUNT CENTER" AND TO USE GIBSON TRADE MARKS AND SERVICE MARKS.
GIBSON PRODUCTS COMPANY INC.*
1228 E LEDBETTER DALLAS, TX
100% OWNED BY GIBSON'S DISCOUNT CENTERS INC.

* H.R. GIBSON JR. AND GERALD P. GIBSON ARE PRINCIPAL OFFICERS AND DIRECTORS OF EACH OF THE ABOVE CORPORATIONS

APPENDIX C CX 41

STORE DIRECTORY

GIBSON PRODUCTS COMPANY

JULY - DECEMBER

1970

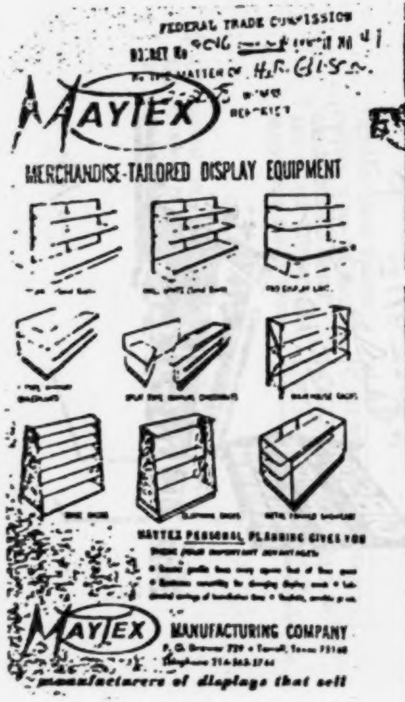
Marked by B.
3/15
"Audrey Thomas"!!
6910057

GIBSONS
DISCOUNT CENTER
WHERE YOU BUY THE BEST FOR LESS

CX 41

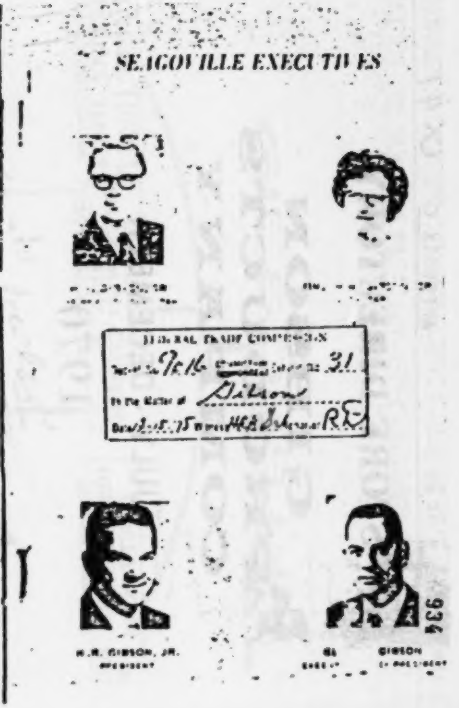
HOME OFFICE
A/C 214 - 287-2570

519 Gibson Street Seagoville • Texas



FEDERAL TRADE COMMISSION
DOCKET No. 9016 [illegible] EXHIBIT No. 41
IN THE MATTER OF H.R. Gibson

MAYTEX
MERCHANDISE-TAILORED DISPLAY EQUIPMENT
MAYTEX PERSONAL PLANNING GIVES YOU
MAYTEX MANUFACTURING COMPANY
manufacturers of displays that sell



SEAGOVILLE EXECUTIVES

FEDERAL TRADE COMMISSION
Docket No. 9016 [illegible] Exhibit No. 31
In the Matter of Gibson
Date 2-15-75 Witness H.R. Gibson R.E.

H.R. GIBSON, JR.
PRESIDENT
GIBSON
934

935

Home Office

NORWOOD FIELDEN
GENERAL MANAGER

SARAH WHEAT
COMPTROLLER

GAYLE OLER
GENERAL COUNSEL

S. B. HAMILTON, JR.
SHOW DIRECTOR

CHARLES CURRIE
ACCOUNTANT

J. P. RIDDLES
ACCOUNTANT

BILL MERCER
ACCOUNTANT

Buyers

ANDY ANDERSON
BUYER SOFT GOODS

JIM FURGASON
BUYER SOFT GOODS

LEE ROY KELSO
BUYER SPORTING GOODS

LYNN H. LOW
BUYER HEALTH & BEAUTY

GARY LEVERETT
BUYER TOYS & JEWELRY

TOMMY PERKINS
BUYER HOUSEWARES

BOBBY REESON
BUYER AUTOMOTIVE
& HARDWARE

BOB STEVENS
BUYER HORT., CANDY
& OUTDOORS

FRANK TERHUNE
BUYER GROCERY

BOB BROUGHTON
DIST. STORE SECURITIES

BILL BARNES
WAREHOUSE MANAGER

CHARLIE DAVIS
RACK SUPPLIERS

TOM FERRELL
TRAFFIC MANAGER

DAVIS FOSTER
ADVERTISING - DALLAS AREA

MARGIE KAUTZ
IDEAL TRAVEL

B. W. HUDSON
DIXIE LABORATORIES

BILL REA
ADVERTISING - TABLOID

LOYD REESE
GIBSON PRINTING CO.

CX 41

APPENDIX D

GIBSON'S
DISCOUNT CENTER
USA
CX1328
STORE DI[illegible]RY
JULY-DEC[illegible]
197[illegible]
GI[illegible]PRODUCTS COMPANY

SEAGOVILLE EXECUTIVES

H. R. GIBSON, SR.

CHAIRMAN OF THE BOARD

MRS. H. R. GIBSON, SR.

SECRETARY

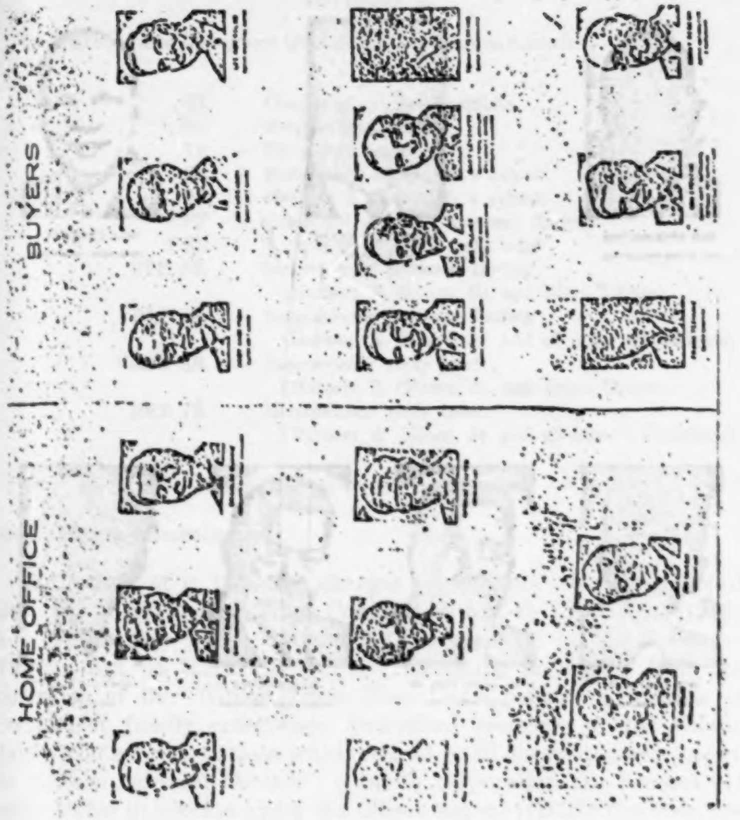
H. R. GIBSON, JR.

PRESIDENT

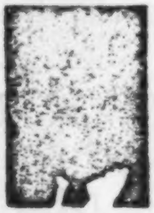
GERALD GIBSON

EXECUTIVE VICE PRESIDENT

CX 1528


BUYERS
HOME OFFICE

BOB BROUGHTON
DEPT STORE SECURITIES


BARDWELL D ODUM
GENERAL COUNSEL

BILL CADDELL
PERSONNEL MANAGER

BOB DAMRON
TRAFFIC MANAGER

S W HAMILTON JR
SHOW DIRECTOR

BILL BARNES
WAREHOUSE MANAGER

MARGIE KAUTZ
IDEAL TRAVEL

B W HUDSON
DIXIE LABORATORIES

CHARLIE DAVIS
RACK SUPPLIERS

JIMMY COBB
GIBSON PRIN. INC.

BILL REA
ADVERTISING

CX 13

APPENDIX E

Abbreviations used throughout this Initial Decision are as follows:

CX – Complaint counsel's exhibits
RX – Respondents' exhibit
Tr. – Transcript page
SR – Herbert R. Gibson, Sr.'s exhibit
JR – Herbert R. Gibson, Jr.'s exhibit
CPF – Complaint counsel's proposed finding
CRB – Complaint counsel's reply brief
RPF SR. – Respondents' proposed finding (Herbert R. Gibson, Sr. and Belva Gibson)
RPF JR. – Respondents' proposed finding (Herbert R. Gibson, Jr. and all other respondents)
RRB SR. – Respondents' reply brief (Herbert R. Gibson, Sr. and Belva Gibson)
RRB JR. – Respondents' reply brief (Herbert R. Gibson, Jr. and all other respondents)

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

The complaint in this case charges respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a) (1976), and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(c) (1976), stemming principally from the operation of the "Gibson Trade Show," one part of a network of respondent family enterprises. Individual members of the Gibson family control corporations which own 43 retail discount stores, known as "Gibson Discount Centers"; a family corporation also licenses 614 other stores to operate under the Gibson name.[1] (ID 29) Together, the Gibson-owned and franchised stores combine to buy many of their products from suppliers at a quarterly private fete in Dallas, staged by the Gibson family, and known as the Gibson Trade Show. (ID 60–61)

[2]Count I of the complaint charges respondents with inducing the payment from suppliers of promotional allowances in connection with the Gibson Trade Show, which allowances were not available on a proportionally equal basis to other customers of these suppliers. This allegation, while maintained under Section 5 of the FTC Act, is

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[1] The following abbreviations will be used in this opinion.

ID – Initial Decision Finding number
ID p. – Initial Decision page number
Tr. – Transcript page number
CX – Complaint Counsel's exhibit number
RAB – Appeal brief of Gibson, Sr.
CAB – Complaint Counsel's appeal brief

patterned after and draws from Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. Count II alleges that respondents, in violation of Section 5 of the FTC Act, collectively boycotted suppliers who did not grant the promotional allowances charged in Count I. Finally, Count III is a distinct allegation of the payment of illegal brokerage in violation of Section 2(c) of the Clayton Act.

Administrative Law Judge Theodor P. von Brand (the "ALJ") dismissed Count I, issued an order against all respondents except Gibson's, Inc., under Count II, and issued an order only against respondent Herbert R. Gibson, Sr. under Count III. Complaint counsel and respondents both appeal.

Respondents' Businesses

A description of the numerous Gibson corporate entities and the intertwining relationship among them and Gibson family members is set forth at length in the initial decision and will not be repeated here. (ID 1–117)

Briefly, the respondents are Herbert R. Gibson, Sr., ("Gibson, Sr."), individually and doing business as Gibson Products Co. and The Gibson Trade Show; his wife Belva Gibson ("Belva"); two sons, Herbert R. Gibson, Jr. ("Gibson, Jr.") and Gerald Gibson ("Gerald"); and eight corporations, five of which are Gibson family controlled.[2] Of the remaining three corporations, two[3] negotiated consent settlements in 1976, and one, Al Cohen Associates, Inc., charged solely in Count III, is still in the case. [3]

Gibson, Sr. founded the retail discount store chain and, until November 1, 1972, directed the franchising and trade show aspects of the family enterprise, doing business as the Gibson Products Company. (ID 3–4) Two other Gibson-controlled corporations, Gibson Warehouse, Inc., and Ideal Travel Agency, were used by Gibson, Sr. as vehicles to store and resell merchandise and to collect booth and show fees at The Gibson Trade Show. (ID 14–15)

As of November 1, 1972, a reorganization and change in operating control of various aspects of the family business was effected, essentially through a transfer of stock by Gibson, Sr. and his wife to a corporation, Gibson's, Inc., all of whose shares were owned by two of their sons, Herbert R. Gibson, Jr. and Gerald Gibson. This corporation now owns and operates the franchising and retail aspects of the family business. Gibson, Sr. retained the trade show business and, having sold the Gibson Products Company name to Gibson, Jr. (ID 16, 25), he registered the name, "The Gibson Trade Show," on November 1, 1972. (ID 26)

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[2] Gibsons, Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Gibson Products Co., Inc.

[3] Progressive Brokerage, Inc. and Barshell, Inc.

The Gibson Trade Show, upon which much of this case turns, is a private trade show where manufacturers display their products to buyers for Gibson owned and franchised stores. (ID 59-61) The show provides the booth space from which the suppliers' representatives can show their wares and attempt to obtain orders.

Gibson, Sr. employs "merchandise managers" or "trade show buyers" to operate the show. These buyers recruit the participation of manufacturers to sell at the show. (ID 78) Buyers discuss product lines, billing terms and prices with suppliers, negotiating to get the best deal on the products to be shown. Upon the satisfactory conclusion of negotiations, a buyer fills in a "show sheet" with the price and terms for each product. These sheets, which are the exclusive order forms used at the shows (ID 90), are headlined "Ship to Gibson Products Company," followed by blank lines for the address of a particular store. (ID 91) They contain a notation that items are not to be shipped at prices higher than those listed or else a deduction will be taken. (ID 93) The trade show buyers patrol the aisles and [4]booths during the show, talking to suppliers' and retailers' representatives.[4] (ID 85)

Payments made by suppliers, and allegedly illegally induced by respondents, in connection with the trade show included the following, for each year from 1969 through 1972: (1) payment for booth rental, in an amount which was identical for all suppliers; (2) payment for services in connection with booth rental including, but not limited to electrical contractor services and furnishings; (3) payment for provision of personnel to prepare and attend the booth throughout the time The Gibson Trade Show was open; (4) payment for advertising in a Gibson tabloid; (5) special trade show prices on one or more of the suppliers' products offered for sale at The Gibson Trade Show; (6) special billing terms on all sales made at the trade show; and (7) special allowances on sales made at the trade show, calculated from a previously negotiated percentage of all such sales (the so-called "show fee").

The principal family business, from at least 1969 to November 1972, from November, 1972 to the date complaint issued in 1975, and to the present, was the ownership and operation of Gibson retail discount stores and the franchising of those stores. Both before and after the November 1972 transfer, the franchise agreements promised the franchisee the benefit of Gibson volume purchasing and advice on merchandise, but reserved to the franchisor the right to order the discontinuance of an item or service if the quality was disapproved.

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[4] In addition to the provision of booth space, the trade show provides meeting facilities and other services, including the opportunity for placement of "blanket orders," recommendations sent to Gibson stores to purchase particular items. (ID 89)

Suppliers are also solicited to advertise in Gibson tabloids, which are used by Gibson retailers as newspaper supplements or which are mailed out or posted in stores. (ID 106) Participating stores purchase the finished tabloids from one of the Gibson family corporations; the tabloids are prepared and printed by G&G Advertising, a proprietorship run by Gerald Gibson. (ID 107) Also, Gibson, Sr. at times sends letters to suppliers requesting that they advertise in particular tabloids. (ID 113-115) If an item is to be advertised in a tabloid, there is a sign on its suppliers' booth at The Gibson Trade Show which states "Recommended tab item."

Participation in the Gibson Trade Show is a standard vehicle for manufacturers wishing to sell to Gibson retail stores. Few other retailers stage private trade shows, however, and, accordingly, the complaint charges that the myriad payments made to the Gibson enterprises were not matched by similar payments or terms to the suppliers' other customers. [5]

No additional facts are pertinent to Count I of the complaint; additional information needed to dispose of Counts II and III is set forth *infra*.

Count I

Count I of the complaint largely tracks the language of the Clayton Act Sections 2(d) and 2(e)[5], as amended, and alleges that the Gibson family and corporate respondents knowingly induced and/or received promotional payments and services in connection with the sale of products to Gibson owned and franchised stores in violation of Section 5 of the FTC Act.[6] The seven types of allegedly illegal allowances are those set forth *supra*. [6]

The ALJ found that the variety of fees and special terms given by manufacturers to respondents were not within the purview of Sections

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[5] Section 2(d), 15 U.S.C. 13(d) (1976), provides:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Section 2(e), 15 U.S.C. 13(e) (1976), provides:

> That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

[6] Although buyer misconduct is not a violation of Sections 2(d) and 2(e), this omission appears to be only a matter of congressional inadvertence. *See Grand Union Co.* v. *FTC*, 300 F.2d 92, 96 (2d Cir. 1962). Nevertheless, such misconduct is cognizable under Section 5 of the FTC Act. *R. H. Macy & Co.* v. *FTC*, 326 F.2d 445 (2d Cir. 1964).

2(d) and 2(e), because they were in connection with the original sale of a product, rather than in connection with its resale.[7] In his view, the allegations of Count I should have been brought under Section 2(a) for price discrimination. Complaint counsel, relying principally on *Alterman Foods, Inc.*, 82 F.T.C. 298 (1973), *aff'd*, 497 F.2d 993 (5th Cir. 1974), which was distinguished by the ALJ, appeal.[8]

Two features differentiate Sections 2(d) and 2(e) from the provisions of Section 2(a). The first is that the seller must either provide "services or facilities" or make payment in consideration of "services or facilities furnished by or through [the] customer." It has been held that the service or payment at issue must be promotional in nature, such as for advertising. *See P. Lorillard Co.* v. *FTC*, 267 F.2d 439, 443 (3d Cir.), *cert. denied*, 361 U.S. 923 (1959). The second is that the payment made or service rendered must be in connection with the "processing, handling, sale, or offering for sale" of a product by the customer, *i.e.*, it must bear a nexus to the resale or preparation for resale by the retailer. *See Rutledge* v. *Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975). If these conditions can be met, the plaintiff may take advantage of Sections 2(d) and 2(e), which carry an easier standard of proof than does Section 2(a). Under Section 2(a), price discrimination is lawful, unless it may substantially lessen or injure competition and, *inter alia*, it is neither cost-justified, nor undertaken to meet competition. Sections 2(d) and 2(e) require no showing of competitive effect, nor do they allow resort to Section 2(a) statutory defenses, save perhaps the "meeting competition" defense. *See* E. Kintner, A Robinson-Patman Primer 270–72 (2d ed. 1979); *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *but see Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956). Thus, Sections 2(d) and 2(e) "create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens." F. Rowe, Price Discrimination Under the Robinson-Patman Act 372 (1964).

The traditional use of Sections 2(d) and 2(e) has been in the realm of cooperative promotional arrangements. *See FTC* v. [7]*Fred Meyer, Inc.*, 390 U.S. 341 (1968). In the classic Section 2(d) and 2(e) case, a manufacturer has compensated a high volume retailer via a discriminatory plan, sometimes in an amount far in excess of that retailer's actual promotional costs, and in so doing has utilized a scheme not realistically available to small retailers. In addition, the manufacturer often rebates a "promotional allowance" to a retailer in an amount tied to the number of units resold by the retailer to the public, but not linked to the retailer's actual promotional expenditures. Plainly, such a transaction is in connection with a resale and within the ambit of Sections 2(d) and 2(e). Similarly, making employees available or arranging with a third party to furnish personnel for purposes of performing work for a customer would also come within Sections 2(d) and 2(e). FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 CFR 240.7, example 6 (1980).

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[7] The ALJ found that the solicitation of fees for tabloid advertising was within the purview of Section 2(d). (ID p. 184) However, he held that complaint counsel had not sustained their burden of showing contemporaneous sales with respect to the items promoted in the tabloids, ID p. 189, and complaint counsel did not appeal from this holding.

[8] Complaint counsel have appealed from other holdings of the ALJ on this count of the complaint, but in light of our disposition of this threshold question, we do not reach these other issues.

Because of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed. Accordingly, we will generally find that Sections 2(d) and 2(e) apply to cooperative promotional arrangements. *See* Rowe, *supra* at 381 ("[T]he legal criteria of Sections 2(d) and 2(e), unless confined to the sphere of cooperative promotional arrangements, would cut across and confound the legal requirements of the separate price and brokerage provisions of the Act.")

The legislative history of Sections 2(d) and 2(e) evidences the relatively narrow scope that Congress intended these specific provisions to have. For example, Representative Utterback, Chairman of the Senate-House Conferees, stated that:

> The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. 80 Cong. Rec. 9418 (1936).

And the Senate and House Judiciary Committee Reports also focus on "special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally." S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15–16 (1936).

In keeping with this narrow scope courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a). [8]Variations in credit terms have consistently been held to present only a Section 2(a) issue, and courts have refused to allow such claims to be maintained under Sections 2(d) and 2(e). *See, e.g., Robbins Flooring, Inc.* v. *Federal Floors, Inc.*, 445 F. Supp. 4, 8 (E.D. Pa. 1977); *Glowacki* v. *Borden, Inc.*, 420 F. Supp. 348, 353 (N.D. Ill. 1976). Likewise, discriminatory freight allowances have been held to be in connection with delivery on the original sale and as such within Section 2(a) rather than Sections 2(d) or 2(e), *see Chicago Spring Products Co.* v. *United States Steel Corp.*, 371 F.2d 428 (7th Cir.

1966), and other so-called delivery allowances have been held not to be in connection with resale and so to state a Section 2(a) rather than a Section 2(d) claim, *Glowacki, supra* at 358–359.

Furthermore, courts have recognized that the purpose of Sections 2(d) and 2(e) is to strengthen Section 2(a) by prohibiting outright hard-to-detect, disguised discrimination in the form of promotional allowances, thus forcing most discrimination into the open area of price allowances or discounts, where it can be measured and adjudicated under Section 2(a). *FTC* v. *Simplicity Pattern Co., Inc.*, 360 U.S. 55, 68 (1959). In light of this salutary, but narrow, statutory purpose, the courts have, albeit not unanimously, resisted expanding the "scope of Sections 2(d) and 2(e) beyond the limited area of applicability intended by Congress," *Cecil Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F. Supp. 819, 850 (M.D. Tenn. 1974); and *see generally Skinner* v. *United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956); *New Amsterdam Cheese Corp.* v. *Kraftco Corp.*, 363 F. Supp. 135 (S.D.N.Y. 1973); *David R. McGeorge Car Co., Inc.* v. *Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

There is some authority, however, for expanding the scope of Section 2(e). *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), cited by complaint counsel, held that preferential differences in the timeliness of delivery were within the purview of Section 2(e) because consistently faster deliveries would ultimately promote and facilitate resale. The very limited acceptance of this decision, *see Glowacki* v. *Borden, supra* at 356; *Harlem River Consumers Cooperative, Inc.* v. *Associated Grocers of Harlem, Inc.*, 371 F. Supp. 701, 710 (S.D.N.Y.), *aff'd*, 493 F.2d 1352 (2d Cir. 1974) (dicta); *Palmer News, Inc.* v. *ARA Services, Inc.*, 476 F. Supp. 1176, 1183 (D. Kan. 1979) (dicta), is outweighed by the strenuous criticism of its expansive view, *see* Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. [9]98, 108–09 (1972); *Cecil Corley Motor Co., Inc., supra* at 851–852, and other courts have either rejected, *id.*; *Buchanan* v. *Yamaha International Corp.*, 1977-1 Trade Cas. (CCH) ¶61,245 at 70,728–29 (D. Ore. 1976), or distinguished the decision, *David R. McGeorge Car Co., supra* at 55; *Purdy Mobile Homes, Inc.* v. *Champion Home Builders Co.*, 594 F.2d 1313, 1317–18 (9th Cir. 1979). Indeed, it is not entirely clear whether the Seventh Circuit continues to hold firmly to its *Centex-Winston* decision. *See Kirby* v. *P. R. Mallory & Co., Inc.*, 489 F.2d 904, 910 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, [1980] 5 Trade Reg. Rep. (CCH) ¶63,229 at 78,126–27 (7th Cir. March 17, 1980); *but cf. Glowacki, supra* at 356. In *Kirby*, which dealt with advertising allowances, the court reaffirmed the accepted distinction between payments and services in connection with the original sale, which are challengeable only under Section 2(a), and those with a connection to the resale, which are cognizable under Sections 2(d) or 2(e). The court then concluded:

> In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price discrimination in the supplier-customer sale and drafted §§ 2(d) and 2(e) to apply exclusively to promotional discriminations like those alleged in this case. 489 F.2d at 910-11.

Whatever vitality remains in the *Centex-Winston* decision, it does not contravene the general standards which we bring to bear upon the facts of this case.

Against this legal background, we approach our earlier decision in *Alterman Foods, Inc., supra*. Unlike the ALJ, we are unable to discern a principled basis upon which to distinguish that case from the one at bar. In a factual setting quite similar to the instant case, *Alterman* held that discriminatory payments to a private trade show were, in fact, unlawful promotional allowances under Sections 2(d) and 2(e) of the Clayton Act. In finding that the Alterman food show had induced suppliers to violate Sections 2(d) and 2(e), the Commission relied upon two kinds of benefits which had accrued to the Alterman retail operation. These benefits were described as "[d]irect in the sense that profits from booth rentals enhanced the financial position of the respondent, and indirect in the sense that the suppliers' booths, displays and demonstrations at the food show were intended to aid in and promote the product's resale to the consuming public." 82 F.T.C. at 343. [10]

After careful reexamination of our decision in *Alterman*, we conclude that its reasoning is flawed and, henceforth, we decline to follow it. Specifically, we do not judge the "benefits" recited in *Alterman*, which are relied upon by complaint counsel, to be sufficiently related to the promotional allowance and resale requirements of Sections 2(d) and 2(e) to trigger application of those provisions.

Undoubtedly, the products purchased by Gibson retail buyers from manufacturers at the trade show were intended for resale to the ultimate consumer. But this fact standing alone is insufficient to transform what is plainly the original sale into one that is in connection with resale. To the extent that Gibson entities received booth rentals and Gibson buyers received price concessions not available to competing customers, an action may lie under Section 2(a). But to focus on the translation of these "direct benefits" down to the next level of competition, *i.e.*, to rely on the fact that these concessions generally enhanced the overall financial strength of the company, enabling Gibson retailers to undercut competitors on subsequent resales, is to misapply the statute.[9] "Benefits" of this sort are inherent in any transaction in which goods are ultimately destined for resale, and to accept the *Alterman* holding would mean opening up Sections 2(d) and 2(e) to practices that Congress intended to be challenged solely under Section 2(a).[10] [11]

As to the "indirect benefits" identified in *Alterman*, we believe they play a role too incidental in the overall transaction here to warrant application of Sections 2(d) and 2(e). In general, marketing assistance, if discriminatorily granted, does run afoul of Sections 2(d) and 2(e). But in the present case, it is clear that the principal function of the trade show was to funnel a high volume of products from manufacturers to participating retailers at a discount price, and not to provide promotional assistance. While various suppliers may have laid out their merchandise and demonstrated their products as complaint counsel contend (CAB 22), and while suppliers may even have discussed selling techniques with would-be buyers, plainly the suppliers' principal purpose in engaging in these acts was to induce retail store buyers to make the original purchases, not to provide marketing or promotional assistance to them.[11] Moreover, no real showing has been made that retailers received "services or facilities" furnished or underwritten by suppliers beyond completion of the original sale. We do not mean to suggest that trade shows are free of the constraints of Sections 2(d) and 2(e) insofar as they facilitate promotion upon resale, but rather we will look realistically at transactions as a whole before deciding to apply Sections 2(d) and 2(e), the narrower statutory provisions, instead of Section 2(a). In this case, the sundry fees paid by suppliers at the trade show were, at bottom, little more than reductions in price necessary to induce Gibson retailers to make the original purchase of the products.

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[9] Of course, an examination of such direct benefits *ab initio* may be necessary to determine whether there has been discrimination among competing customers. *See* Kintner, *supra* at 254. But even if we assume for purposes of this discussion that all seven categories of alleged discriminatory payments, including the show fees, inured somehow to the benefit of the Gibson retailers, that does not automatically bring such payments within the purview of Sections 2(d) or 2(e). Although it is not entirely clear, it appears that the Commission in *Alterman* analyzed the direct benefits in terms of both the discrimination and resale issues.

[10] Our holding is not inconsistent with *R. H. Macy & Co.* v. *FTC*, 326 F.2d 445 (2d Cir. 1964), in which Macy's solicited vendors to contribute $1,000 apiece to help defray advertising and promotional costs of its 100th anniversary celebration. While complaint counsel would read *Macy* as proscribing the receipt of payments as "general revenue," in fact the court specifically found that Macy's used the contributions for advertising purposes:

> Macy's used the payments for institutional advertising and promotions to get more people into its stores to buy the goods of all its vendors. The payments by the contributing vendors were thus in consideration for services or facilities furnished by Macy's in connection with the *offering for sale* of the vendor's goods. *Id.* at 450.

[11] In *Elizabeth Arden, Inc.* v. *FTC*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); and *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962), for example, manufacturers' employees were utilized to demonstrate product use to customers at retail outlets. The marketing assistance in the instant case, by contrast, was no more than a tangential element of the transaction.

We believe this result comports most closely with the intent of Congress and the meaning of the statute. Accordingly, Count I, which rests on too expansive an interpretation of the jurisdictional requisites of Sections 2(d) and 2(e) of the Clayton Act, is dismissed.

Count II

Few manufacturers could resist the subtle persuasion of Herbert R. Gibson, Sr. to participate in the Gibson Trade Show. And, indeed, as Gibson, Sr. would point out, matters had been arranged so that the Gibson Trade Show was a very important vehicle for selling to Gibson retail stores. The trade show afforded suppliers a unique opportunity to exhibit their wares to a multitude of Gibson retail stores [12]at once. On occasion, however, Gibson, Sr. and would-be trade show participants, such as the Toastmaster Division of McGraw Edison Company, would have a disagreement over the sundry fees to be paid by the exhibitor.

Toastmaster had participated in Gibson trade shows from 1966 to 1970, but in 1970 was unable to agree with Gibson buyers on terms for its future participation. (ID 379, 384–386) On January 22, 1971, a letter was sent out to "All Stores" by two buyers from the Gibson Products Company, Tommy Perkins and Bobby Regeon, concerning Toastmaster. (CX 104) It read:

> The above company will not sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or authorize this line, and suggest that you discontinue the same.
>
> Please give this your attention, and we appreciate your continued co-operation.

Similar letters, signed by Tommy Perkins, were sent out on March 11, 1971 and March 30, 1971 concerning Tucker Manufacturing Co. and Jeannette Glass Co., respectively. (CX 303, CX 136) There was evidence as well of other direct and indirect communications to Gibson-owned and franchised stores suggesting they not purchase from designated suppliers.

Toastmaster sales to Gibson-owned and franchised stores, which had amounted to $953,656 in 1970, plummetted to $296,778 in 1971. (ID 390) Tucker and Jeannette sales also fell sharply following the Perkins letters. (ID 398–99, 408)

Despite efforts by Toastmaster representatives to sell directly to individual Gibson franchised stores, sales remained depressed for two additional years. In 1974, Toastmaster met Gibson, Sr.'s terms for participation in the trade show, and its sales to Gibson stores went up. (ID 392)

The ALJ found that the Gibson family respondents and the Gibson corporate respondents, in combination with some or all of the Gibson family owned stores and Gibson franchised stores, had maintained an illegal boycott of suppliers who would not grant the special allowances demanded on sales during or incident to the trade show. He found that respondents had induced Gibson franchised stores to stop buying from specified suppliers in order to coerce those suppliers into paying increased show fees to Gibson, Sr. for participation in the trade show. All Gibson family [13]respondents were placed under order, as they were officers and directors of Gibson Products Company (ID p. 9), the name under which the trade show operated until November 1, 1972.[12] The order also binds all Gibson corporate respondents, save Gibson's, Inc., which was not in existence when the boycott began. Inclusion of these respondents was premised on the ALJ's finding of mutual interdependence and integrated operation among all Gibson corporate and family respondents.

Respondents appeal, contending that the evidence is insufficient to sustain a finding that there was a boycott. Respondents argue that there is no evidence that specific retailers ceased buying Toastmaster products because of the January 22, 1971 letter; that it was improper for the ALJ to find a drop in Toastmaster sales from 1970 to 1971; and, finally, that it was improper for the ALJ to infer a boycott from the drop in sales. Complaint counsel appeal from the ALJ's refusal to include Gibson's, Inc. in the order. For the reasons discussed below, we agree with complaint counsel.

Group boycotts generally are *per se* violations of the antitrust laws. "[C]ertain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . [G]roup boycotts are of this character." *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966).[13]

[14]The rule of *per se* illegality has been applied to three types of group boycotts: (1) horizontal combinations of traders at one level of distribution, the purpose of which is to exclude direct competitors from the market; (2) vertical combinations of traders at different marketing

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[12] Belva Gibson appeals from her inclusion in the boycott finding and order, claiming she did not actively participate in the boycott. In light of the fact that Belva Gibson was an officer and director of all of the Gibson corporate respondents, except for Gibsons, Inc., we find that she was properly included in the order.

[13] We are not unaware of decisions applying the rule of reason to conduct that was alleged to be a "boycott," *see, e.g., Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). But the considerable differences between the conduct in those cases and conduct traditionally proscribed under a *per se* standard suggests that there may be no real inconsistency in approach. *See* Sullivan, Handbook of the Law of Antitrust 256-59 (1977). In any event, the facts of the instant case fall well within existing *per se* decisional law, and hence we have no occasion to explore the precise dividing line between *per se* illegal boycotts and arrangements that should be examined under the rule of reason. *See generally St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 542-43 (1978).

levels, the purpose of which is to exclude competitors of some members of the combination; and (3) combinations "designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). *See also United States* v. *General Motors Corp., supra; Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119, 127 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

The conduct at issue here plainly falls within the third category noted above. The boycott victims all refused to pay or increase the percentage paid to Gibson, Sr. as a show fee for participation in the Gibson Trade Show. In order to induce these firms to pay the demanded amount, Gibson Products Co. requested Gibson-owned and franchised stores to stop buying their products, thus denying them access to the Gibson market. This action manifests both exclusionary and coercive conduct, thereby exhibiting rather clear anticompetitive effects. And respondents' utilization of their status as franchisor to Gibson stores for the purpose of coercing firms to participate in the trade shows at a price they were unwilling or unable to pay admits of no redeeming virtue.

Respondents' appeal, premised almost exclusively on factual grounds, is unpersuasive. The letters to Gibson stores were plainly invitations to boycott.[14] On their face, these letters went significantly further than the communications in *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600 (1914), the circulation of which was held to be a violation of Section 1 of the Sherman Act. The *Eastern States* letters contained no request to refrain from dealing, but merely set out the names and addresses of wholesalers who also sold at retail. The Supreme Court found, in light of the record in that case, that the circulation of such information had the "natural effect of causing [15]such retailers to withhold their patronage from the concern listed." 234 U.S. at 609. And the letters in this case contained the very suggestion of incitement and mutual action that was found lacking in the case relied upon by respondents, *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 112 (2d Cir. 1975).

Neither does the fact that there was no express mutual agreement to boycott vitiate the finding of a collective refusal to deal. *See Eastern*

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[14] The ALJ found that respondents' testimony that the letter regarding Toastmaster was sent out only to those stores which had already complained about Toastmaster products was not credible, and we agree. The record compels the finding that "All Stores" meant just that, and that the letter was received, or intended to be received, by all stores operating under the Gibson name, both franchised and family-owned.

States, supra at 608–609. It is sufficient that knowing concerted action was contemplated and invited, the stores adhered to the request.[15] *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939); *FTC* v. *Cement Institute*, 333 U.S. 683, 716 n.17 (1948). All stores which received the letter are chargeable with knowledge that concerted action was at least contemplated, *see Interstate Circuit, supra* at 222, and it is evident from sales data and corroborative testimony that a very substantial number of stores did participate in the scheme.

Respondents attack the chart which displays sales data, CX 117A–D, contending that it is impermissible to infer a "precipitous drop" in Toastmaster sales to Gibson stores from that chart. Supposedly, it is not clear on the face of the document which figure represents total sales for a particular year.

Each of the four documents in this exhibit contains two charts. The first is labeled "Monthly Dollars," the second "Cumulative Dollars." On both charts each row is labeled with a month and each of the first eleven columns is labeled with a product. The twelfth column is labeled "other appliances" and the last column is labeled "total." It is clear that each figure in the "Total" column of the Monthly Dollars chart represents the dollar value of all products sold that month. It is equally clear that each figure in the "Total" column of the Cumulative Dollars chart represents the cumulative total of all products sold in the preceeding months. Consequently, the last figure in the "Total" column of the chart represents the sale of all products through December, or the total for that year. Respondents have advanced no alternative interpretation of this figure, and indeed, the chart will support none. We thus find respondents' argument in this respect to be utterly without merit. **[16]**

Respondents, citing the general rule against admissibility of hearsay, also object to reliance on testimony and memoranda by Toastmaster representatives who recalled being told by Gibson franchisees that, essentially, they were under boycott. (*See* Tr. 3464–66, CX 106A) Hearsay evidence is admissible, however, in FTC adjudicative proceedings, provided that it meets the standard set out in our Rules of Practice Section 3.43(b), *viz.*, that it be "relevant, material, and reliable." *Resort Car Rental System, Inc.* v. *FTC*, 518 F.2d 962, 963 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975). In this case, the proffered evidence is consistent with and corroborative of other facts in the record. While we would attach less weight to hearsay evidence standing alone, under the circumstances presented here we see no reason to exclude it or ignore it.

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[15] The fact that the letters were sent out on Gibson Products Company stationery, the name under which Gibson, Sr. granted the stores their franchises, itself suggests the presence of considerable inducement to the franchisees to comply. Roy Love, a franchisee in Oklahoma City, clearly had this in mind when he told Toastmaster's representative, after receiving his copy of the letter, that "if he wanted to keep his sign out in front of his store, saying 'Gibson's,' he had to go by what Seagoville [Gibson management] ordered or told him to do." (Tr. 3466)

Respondents' final argument is that even if Toastmaster sales to Gibson stores did drop, the decline was more likely attributable to factors other than the boycott, *viz.*, dissatisfaction with Toastmaster products, an asserted preference by Toastmaster's sales representative to sell to distributors instead of directly to retailers, and Toastmaster's lack of access to Gibson retailers because of its non-participation in the Gibson Trade Show.[16]

We agree that an inference of conspiracy should not be drawn where other inferences are equally plausible, ***First National Bank of Arizona*** v. ***Cities Service Co.***, 391 U.S. 253, 280 (1968), but respondents clearly fail to make this showing.

Although respondents offered testimony on complaints received about Toastmaster's shipping policies at Christmas time (Tr. 6639), there was no evidence that any store stopped buying Toastmaster goods due to these problems, nor did the witnesses themselves suggest that this was the case. Furthermore, respondents' claim that dissatisfaction with Toastmaster's warranty program contributed to the decline in sales is supported only by the testimony of one witness, who stated that such dissatisfaction caused him to discontinue selling the Toastmaster line sometime in the mid-1960's. (Tr. 7893–94) No evidence is offered that this caused any store to discontinue buying Toastmaster goods in 1970–1971. The additional claim that Toastmaster's failure to live up to its commitments caused the decline is supported only by testimony from the witness who claimed he stopped buying this line of goods during a period [17]of time when he was not working for any Gibson discount store but for another store altogether (Tr. 7938–39). All of this evidence fails to establish that any Gibson store stopped buying Toastmaster products in the relevant period for any of the suggested reasons.

The second explanation offered, that Toastmaster's representative preferred selling to distributors, and that he did not want to increase his sales to Gibson stores (Tr. 3507–08), also fails to find support in the record. No evidence was offered to establish a decision on that representative's part to stop selling to Gibson stores. Nor could it be inferred that because he did not wish to increase sales that he, therefore, wished to decrease them. By contrast, his own testimony indicates that he continued to try to sell to individual Gibson stores, even after the January 22, 1971 letter. (Tr. 3464–65)

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[16] Respondents Gibson, Jr. and Gerald also contend that retail stores in which they were financially interested did not participate in the boycott. These respondents have offered little evidence to rebut complaint counsel's *prima facie* case in this respect, however. In any event, since responsibility for sending the boycott invitations may be attributed to these respondents, the question of their stores' acceptance of their invitations is essentially immaterial.

The last alternative explanation, which cites Toastmaster's non-participation in the trade show as the cause of its decline in sales, is rather ironic, since it was Toastmaster's refusal to accept Gibson, Sr.'s demand for increased trade show participation fees which led to its being blacklisted in the first place. Even if we were to dignify this argument by full consideration of it, however, we would have to conclude that it is not adequately supported by the record. Respondents proffered no direct evidence of the impact, in the absence of a boycott, that non-participation in the trade show would have on a firm's ability to sell directly to individual Gibson stores. Without any indication of the magnitude of this impact, we cannot infer that non-participation in the trade show alone could have caused such a sharp drop in Toastmaster sales in 1971.

Respondents have failed to establish the existence of legitimate business reasons on the part of Gibson retailers, wholly distinct from their receipt of the boycott letter, which would account for the sharp drop in Toastmaster sales. *Cf., DuPont Glore Forgan, Inc.* v. *American Telephone & Telegraph Co.*, 437 F. Supp. 1104, 1126 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978). Neither are we persuaded that this drop in Toastmaster sales was "mere chance." *Interstate Circuit, supra* at 223. Respondents' actions and their consequences cannot be explained by alternate inferences that can be drawn from the record, and in light of the specific invitation to boycott and the subsequent evidence as to the effects of the invitation, we find that respondents have violated Section 5 of the FTC Act by engaging in an unfair method of competition, *viz.*, a group boycott.[17] We find further that, despite a modest rebound in Toastmaster sales to individual Gibson stores in 1972 and 1973, this boycott plainly continued until at least 1974 when Toastmaster capitulated to the demands of Gibson, Sr.'s representatives [18]for higher fees for participation in the Gibson Trade Show. (ID 392) We note also that respondents have offered no evidence to show that the boycott was discontinued prior to 1974.

The ALJ, finding that the individual and corporate Gibson respondents comprised a single entity, issued an order on this count of the complaint binding all of them, save Gibson's, Inc. Without necessarily agreeing that there was complete unanimity of interest among all respondents under the pre-November 1, 1972 organizational structure of the Gibson family business, we conclude that the ALJ was correct in placing all such respondents under order.

First, substantial commonality of interest was demonstrated, especially in the pre-November 1, 1972, environment. The ALJ found that all individual respondents, including Gibson, Jr. and Gerald, were officers of Gibson Products Company, the franchisor corporation, with authority broad enough to include knowledge and approval of the dissemination of the boycott letters. Inclusion of the corporate respondents was correctly premised on the ALJ's finding of their mutual interdependence and on the interdependence among the corporate and individual respondents collectively. It is not necessary for this purpose to determine, as the ALJ did, that all respondents were part of a single enterprise in the pre-November 1, 1972 period.

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[17] Indeed, under these circumstances an invitation to boycott, irrespective of its actual effects, might violate Section 5 if the soliciting party has a reasonable expectation that the invitation will be accepted and acted upon.

Second, respondents' operations are sufficiently integrated that an order embracing all of them is necessary to insure the effectiveness of the relief we have directed. Some fencing in to prevent circumvention of Commission orders is appropriate and lawful, *see Sunshine Art Studios, Inc.* v. *FTC*, 481 F.2d 1171 (1st Cir. 1973); *Delaware Watch Co., Inc.* v. *FTC*, 332 F.2d 745 (2d Cir. 1964), and where, as here, it has been shown that respondents' operations are closely integrated, it is probably indispensable.[18]

[19]Complaint counsel appeal from the failure to include Gibson's, Inc., the principal post-November 1, 1972, corporate entity, in the boycott provisions of the order. The ALJ reasoned that since Gibson's, Inc., did not exist at the time of the boycott, it should not be covered. (ID p. 210) We disagree.

The evidence indicates and we have found that the boycott of Toastmaster continued until at least 1974, and indeed, complaint counsel contend that Jeannette is still being boycotted. (RAB 31) Since institutional management of the Toastmaster boycott, at least in the post-November 1, 1972, period, was in the hands of Gibson's, Inc., which became the franchisor corporation, or of its officials, we find that that corporation participated substantially in the conspiracy, and is chargeable as a member thereof.

Indeed, even if the boycott had not continued after November 1,

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[18] Respondents object also to the entry of an order against the lot of them precisely because they are so closely interwoven, on the ground that corporations cannot conspire with their own subsidiaries, affiliates, or officers. *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974), *modified*, 401 F. Supp. 1374 (N.D. Cal. 1975), *modified*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). It is contended, for example, that Gibson, Sr. and his wife could not have conspired with the corporate respondents because they owned a controlling interest in each. Without discussing the permutations of who amongst the Gibson corporate and family respondents could be held to have conspired with whom, we simply note that concerted action between related corporations which has the purpose or effect of unreasonably restraining the trade of unrelated third parties is highly suspect under the intra-enterprise conspiracy doctrine. *See, e.g.*, American Bar Association, Antitrust Law Developments 33 (1975), and cases cited therein. Moreover, we have made appropriate provision in Part I of the Final Order for those circumstances in which some of the respondents collectively own retail stores.

We have no occasion here to examine the outer reaches of intra-firm conspiracy doctrine in any event, principally because the conspiracy we have found relates mainly to the agreement between the respondents (and each of them) and the Gibson franchised stores to boycott designated suppliers' product lines. Also, of course, the corporate respondents were all held because their interdependence required doing so in order to insure the effectiveness of the relief ordered, and "bathtub conspiracy" doctrine does not address this question at all.

1972, it would still be necessary and proper to include Gibson's, Inc. in the order. Where a business found guilty of unfair trade practices is continued by a subsequently formed corporation, both businesses may be subject to the cease and desist order, *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir.)., *cert. denied*, 400 U.S. 926 (1970). The determination to include the newly formed company hinges on various factors which include whether both companies engaged in the same business, the capability of the new company to resume the unfair practices, and whether there is substantial identity of ownership between the old company and the new, *id.* at 272. Prior to November 1, 1972, the franchising business and the Gibson trade show were operated by Gibson, Sr. under the aegis of the Gibson Products Co. Gibson, Jr. and Gerald Gibson were president and executive vice president of that company. Currently, Gibson, Sr. operates the trade show and Gibson, Jr. and Gerald carry on the franchising business through Gibson's, Inc. Clearly the same parties found to have engaged in the boycott are still in control of the same businesses which were involved in the boycott. In light of the integrated nature of the business operations prior to November 1, 1972, the fact that the Gibson Trade Show continued to be oriented to Gibson stores, and the existing family relationship, the division of labor represented by the franchising business being taken over by the newly formed Gibson's, Inc. does not justify excluding that corporation from the order. Thus, the order will run to this corporation as well. [20]

COUNT III

Complaint counsel challenge under Section 2(c) of the Clayton Act[19] the receipt of commissions by Gibson, Sr., from two brokers representing Ray-O-Vac Company, Barshell, Inc., and Al Cohen Associates, Inc. The statute bans payments of brokerage or allowances in lieu thereof by one party in a transaction to the other and by either party to the other's agent. Complaint counsel tried the Count III charges on the theory that Gibson, Sr. acted in these transactions as a principal or buyer, not on the theory that he acted as intermediary or agent of other respondents or nonrespondent franchisees.

The ALJ found that Gibson, Sr. (but none of the other Gibson family respondents) had violated Section 2(c) by splitting brokerage fees with Barshell.[20] (ID p. 198) At least one such payment by Barshell to Gibson, Sr. of a part of its commissions from Ray-O-Vac was made in September, 1972, while Gibson, Sr. was owner and operator of various Gibson retail stores, and, thus, while he was clearly a "buyer." As a consequence, an order was entered against Gibson, Sr. [21]

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[19] Section 2(c), 15 U.S.C. 13(c) (1976), provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

With respect to the charge of splitting commissions with Al Cohen Associates, the ALJ found that while substantial payments to Gibson, Sr. had been made by Al Cohen in 1974 and 1975, Gibson, Sr. was not a "buyer" at the time, because he no longer had an ownership interest in any retail operation. The law judge, therefore, found that Section 2(c) had not been violated and dismissed the complaint against Al Cohen Associates. (ID p. 198)

Both sides appeal, and we will consider each of the issues raised *seriatum*.

First, Gibson, Sr., relying on *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974), contends that the "in commerce" requirement of Section 2(c) has not been met. (RAB 19–22) We disagree.

The question answered in the negative by the Supreme Court in *Copp* was "whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation 'in commerce' within the meaning of each of these sections [§ 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and §§ 3 and 7 of the Clayton Act] and whether such sales are 'in commerce' and 'in the course of such commerce' within the meaning of §§ 2(a) and 3 respectively." *Id.* at 188. There was no argument in *Copp* that sales were, in fact, made in interstate commerce or were otherwise directly involved in national markets. Rather, Copp argued only that the "in commerce" requirement was satisfied because the asphaltic concrete was used in construction of interstate highways. *Id.* at 198.

By contrast, the brokerage payments made in this case were allowances upon all Ray-O-Vac sales to Gibson retail stores, both family-owned and franchised, in a 20-state area. (ID p. 194) Thus, not only could one find an "ample nexus to interstate commerce in the whole transaction," *Shreveport Macaroni Manufacturing Co.* v. *FTC*, 321 F.2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964), as the ALJ did, but the underlying sales were, in fact, directly in interstate commerce, making this a straightforward case.

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[20] Gibson, Sr. argues that the specific violation found by the ALJ was not alleged in the complaint. (RAB 8) We find, however, that respondent had ample notice of what complaint counsel intended to prove, that he had adequate opportunity to defend against the charges, and that he, in fact, took advantage of this opportunity. *See, inter alia*, Complaint Counsel's Answer to Motions to Exclude Evidence, and Respondent's Reply to Answer to Motions to Exclude Evidence, each filed December 2, 1977.

Respondent's other threshold argument is that a showing of discrimination is a necessary prerequisite to a finding of a Section 2(c) violation. (RAB 22–25) Once again, we disagree.

The proscription of Section 2(c) is absolute in prohibiting the payment of brokerage to the other party to a transaction or to that party's agent, "except for services [22]rendered." The legislative history[21] and the case law support this understanding. Such doubt as exists in this area was created by dicta in the decision of the Supreme Court in *FTC* v. *Broch & Co.*, 363 U.S. 166 (1960).[22] While *Broch* may have generated some confusion, *see* Rowe *supra* at 344–345, the weight of authority is that a showing of discrimination in the payment of "dummy brokerage" is not a generic statutory requirement.

In *Broch* an independent broker agreed to lower his commission in order to give a purchaser a lower price. The issue was whether the lower price that the buyer obtained was an allowance in lieu of brokerage in violation of Section 2(c). The Supreme Court found a violation, reasoning that this situation was analogous to a broker splitting part of his commission with the buyer. The Court was concerned, however, that brokers be able to change their prices without every consequent saving to a buyer being judged an "allowance in lieu of brokerage." Thus, the Court wrote, "[t]his is not to say that every reduction in price coupled with a reduction in brokerage, automatically compels the conclusion that an allowance in lieu of brokerage has been granted." 363 U.S. at 175. The Court went on to explain that "[a] price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers." *Id.* at 176. The Court's language that "whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case," *id.*, cannot fairly be read to require a showing of discrimination as a prerequisite to finding any Section 2(c) violation. [23]

Read as a whole, *Broch* represents an effort by the Court to plug a possible statutory loophole through use of the "allowance in lieu of brokerage" provision. Because of difficulties peculiar to transactions of the type considered in *Broch*, it was necessary to use the notion of discrimination as an element in establishing whether a price reduction was an allowance in lieu of brokerage.

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[21] The Conference Report states:

> [T]his subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.

H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936).

[22] Respondent's argument is not based on a specific holding in *Broch*, but only upon the Court's occasional references, in the context of the facts of that case, to "discriminatory" brokerage.

The instant case is quite different, however. Here it is alleged that the seller made payments to a broker who, in fact, was under the control of the buyer and who passed on most of his commissions to that buyer.[23] *Broch* reviews the legislative history of Section 2(c), finding:

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. 363 U.S. at 169.

Thus, the type of transaction we consider here is precisely that which it was the major legislative purpose to curtail. While respondent quotes at great length from such cases as *Shreveport Macaroni Manufacturing Co.* v. *FTC, supra; Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra;* and *Rohrer* v. *Sears, Roebuck & Co.*, 1975–1 Trade Cas. ¶60,352 (E.D. Mich. 1975), for the proposition that Section 2(c) is directed at discrimination, none of these cases is factually apposite and none demonstrates that, in general, discrimination is a necessary element of a Section 2(c) violation.

As a matter of statutory construction of Section 2 as a whole, subsection 2(c), like subsections 2(d) and 2(e), necessarily makes certain business practices, other than price discrimination, unlawful, as it is designed to eliminate hidden preferences by forcing them "into the open" for measurement and adjudication under the more forgiving price discrimination provisions. *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959).[24] Moreover, subsections 2(d) and 2(e) on their face require a showing of discrimination, while subsection 2(c) does not, thus manifesting an explicit congressional determination not to require discrimination as a precondition to finding illegal [24]dummy brokerage. Given the purpose and structure of the Act and the illogic of addressing the problem of dummy brokerage in terms of discrimination, a general requirement that discrimination be shown cannot and should not be read into Section 2(c).

Complaint counsel cites *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), for the proposition that *Broch* is not to be understood to require generically a showing of discrimination, and we find the discussion in that case convincing. In *Rangen* it was concluded that Section 2(c) applies to payment of commercial bribery and that discrimination is not a necessary element of a Section 2(c) violation.

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[23] The ALJ found that "Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter." (ID 197)

[24] The Court in *FTC* v. *Simplicity Pattern Co.* noted expressly that each of subsections (c), (d), and (e) makes certain practices other than price discrimination unlawful. 360 U.S. at 65.

The Court explained that:

> discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage transaction; and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage. 351 F.2d at 858.

Respondent cites no decisions other than *Broch*-type cases involving allowances in lieu of brokerage in which a Section 2(c) case was dismissed for failure to show discrimination. We, therefore, conclude that Section 2(c) means, in essence, what it says, and that complaint counsel need not demonstrate, as respondent would require, that dummy brokerage has been paid to others, with favored customers receiving larger payments. Accordingly, the threshold requirements to utilize Section 2(c) have been satisfied in this case.

Respondent next raises certain factual objections to a finding of a Section 2(c) violation. Gibson, Sr. contends that the check that was issued to him on September 23, 1972 (CX 192), which was found by the ALJ to be evidence of the illegal brokerage, was, in fact, an unrelated 3% commission or show fee due Gibson, Sr. for sales by the Gibson Trade Show of merchandise belonging to Barshell. (RAB 13) There is a conflict in the testimony on this point between Barshell's proprietor, Mr. James Miller, and Mr. Lynn Low, a trade show buyer for Gibson, Sr. We resolve the conflict as the ALJ did, by crediting Mr. Miller's testimony.

Mr. Miller testified, in essence, that Gibson, Sr. would review his "commission statements" (which indicated total sales by Ray-O-Vac through Barshell to Gibson stores) and assess a corresponding charge as his brokerage fee upon Mr. Miller's commission. (Tr. 3132–34) Mr. Miller identified the check in question, CX 192, as his payment to Gibson, Sr., for this purpose. Mr. Low contended that CX 192 was Barshell's check in payment for the Gibson Trade Show's sales of Barshell's health and beauty aids. (Tr. 7523–24) There is evidence, however, [25]that Mr. Miller sold health and beauty aids, not through Barshell, but through his other corporation, Progressive Brokerage. (Tr. 3136–37) In fact, Mr. Miller testified that Barshell was formed specifically to be a housewares distributor, "[a]nd that's why I chose to move it [Ray-O-Vac] into that company [Barshell], as opposed to our beauty aids rep." (Tr. 3145) Had the payments been for the purpose described by Mr. Low, therefore, the check presumably would have been made out to Progressive Brokerage, rather than to Barshell. Moreover, Mr. Miller's testimony is consistent with evidence of Gibson, Sr.'s course of dealing, and is specifically consistent with the ALJ's finding that Gibson, Sr. had an agreement with Mr. Miller's successor as agent for Ray-O-Vac to do precisely the same thing. (ID 425–29)

Gibson, Sr. next contends that he was not a buyer in September, 1972, and, thus, cannot be liable under complaint counsel's theory of violation. (RAB 17–19) This argument is without merit. We agree with the ALJ that at least in the context of his personal ownership and operation of individual retail stores, as well as in his role as head of Gibson Products Company, Gibson, Sr. was plainly a buyer.

Respondent relies heavily on *Nuarc Co.* v. *FTC*, 316 F.2d 576 (7th Cir. 1963), where it was held that under certain circumstances mere ownership may not suffice to make one a buyer within the meaning of the Act, but *Nuarc* is factually inapposite. In that case the Commission was required to try to establish a link between two corporations to show a pass-through of benefits from one to another. The instant case is substantially different. Purchases from Ray-O-Vac by at least the Gibson, Sr.-owned retail operations can be attributed to the actions of Gibson, Sr. personally. No pass-through of benefits need be demonstrated. Gibson, Sr. is covered by the statutory provision because, as the buyer in the transaction, he or his agent received brokerage payments from the other party to the transaction or from his agent.

Finally, respondent argues that assuming CX 192 represents a brokerage check and assuming that he was a buyer at the time, he has met the statutory exception for "services rendered." (RAB 28–30) It is unclear whether this exception applies as between buyer and seller, although *Broch*, *supra* at 173–74, suggests that it may.[25] However, even assuming that buyers may avail themselves of it, respondent has not come forward with adequate evidence to substantiate this claim. [26]

Respondent has made no effort in concrete terms to establish the value of the services he rendered in relation to the brokerage payments he received. It is not contested that respondent's services in inducing the purchase of Ray-O-Vac products by Gibson stores were in the nature of brokerage or were "selling type" services within the exception in Section 2(c). But, even assuming this exception is available to buyers, respondent's burden is considerably greater and more specific than he contends, and by doing little more than articulating his claim to the exception, he has failed to meet that burden.

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[25] "There is no evidence that the buyer rendered any services to the seller or to the respondent [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances," *FTC* v. *Broch & Co.*, *supra* at 173; *but*, *cf.*, *Southgate Brokerage Co., Inc.* v. *FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945).

Alternatively, several cases suggest the availability in these circumstances of a "functional discount" justification. *See Central Retailer-Owned Grocers, Inc.* v. *FTC,* 319 F.2d 410 (7th Cir. 1963); *Empire Rayon Yarn Co., Inc.* v. *American Viscose Corp.*, 364 F.2d 491 (2d Cir. 1966) (en banc), *cert. denied,* 385 U.S. 1002 (1967); and *Hruby Distributing Co.*, 61 F.T.C. 1437 (1962). Specifically, respondent would have to demonstrate that he performed a valuable service entitling him to a functional discount, the size of which would correspond to the distribution costs the seller saved as a result. *See Central Retailer, supra* at 414; *Empire Rayon, supra* at 492.

The analysis that would be undertaken to ascertain whether respondent had proffered an adequate functional discount justification would closely approximate that undertaken to evaluate the "services rendered" by him. The two concepts share a marked similarity, although the focus of each differs slightly, in that the first examines the overall value of respondent's services, while the second fixes upon the savings to the supplier as a consequence of respondent's performance of certain functions the supplier otherwise would have undertaken itself. Arguably, the "services rendered" exception is broad enough to encompass any justification which might be offered under the functional discount rubric, but the ALJ considered them separately and, for purposes of review, we do likewise.

The ALJ concluded, correctly, that there was no showing here that respondent performed any functions that might have entitled him to a discount of a measurable size. For example, it was not shown that Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Nor was there evidence that Ray-O-Vac was even aware of his activities. As the ALJ noted, this militates strongly against any finding that the split brokerage constituted a functional discount for distributional services. Respondent's appeal, therefore, is denied.

Complaint counsel's appeal is premised exclusively upon the theory that all of the Gibson respondents constituted a "single economic enterprise," both before and after November 1, 1972. Under this scenario, all respondents should be found liable and placed under order as a consequence of the Barshell transaction, and Al Cohen Associates should be held as a consequence of the transactions in which it was involved, for if [27]all respondents comprised a single enterprise, then Gibson, Sr. must have been a buyer even in 1974 and 1975, when he no longer owned any Gibson retail stores.

To a large extent, we need not address the merits of complaint counsel's appeal. Leaving aside the "single economic enterprise" contention, there is no doubt that before November 1, 1972, all Gibson businesses were at least closely knit. (See discussion *supra* at pp. 18–19). The Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson-owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief, in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented.[26] *Sunshine Art Studios, Inc.* v. *FTC, supra; Delaware Watch Co., Inc.* v. *FTC, supra.*

We are aware that this disposition means that no order will issue against Al Cohen Associates, for we do not address whether a "single economic enterprise" existed after November 1, 1972. In view of the fact that we are binding all of the individual Gibson respondents, however, we do not find this to be a significant omission.

Remedy

A broad order is warranted against all respondents charged in connection with Count II. A substantial question is presented, however, with respect to paragraph 5 of the ALJ's order, which directs respondents to cease and desist from "utilizing franchising or licensing agreements containing (a) provisions whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold and services rendered by such licensees or franchisees." [28]

The ALJ found that virtually the only occasions upon which these provisions had been exercised had been to further group boycotts of the type we condemn today. He concluded that, "[i]n view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right." (ID p. 211)

We are troubled by this provision, because merchandising advice and quality control clauses in franchise agreements are hardly novel, and they frequently offer legitimate protection to the franchisor's tradename without also serving an anticompetitive purpose. It may indeed be the case that respondent's illegal conduct has been perpetrated under the guise of these clauses, but the remedy may be to restrain the conduct, not the clauses. We are satisfied that an order addressed to conduct, especially as it affects price or concerns suppliers vis-a-vis the trade show, will be adequate to insure that the underlying purpose of the order is not circumvented. We have modified the order to substitute for paragraph 5 of the ALJ's order a more narrow provision focusing on the content of communications from respondents to franchisees. It should, accordingly, be very difficult for respondents to utilize the merchandising advice and quality control clauses they retain in an anticompetitive manner without thereby violating another provision of the order.

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[26] The ALJ found that the liability of respondents H. R. Gibson, Jr. and Gerald Gibson for Section 2(c) violations could not be established, because complaint counsel failed convincingly to tie them to the receipt of illegal brokerage. (ID pp. 202–08) While we do not reverse this determination, neither does this result preclude, for fencing-in purposes, placing Gerald Gibson and Gibson, Jr. under order.

Respondents' additional objections to paragraphs 3 and 4 of the ALJ's order are denied, as these provisions constitute reasonable fencing-in related directly to the conduct held to be illegal in this case. *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 388 (1959); *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946). Essentially, these provisions prevent respondents from blocking supplier sales to franchisees, either at respondents' whim or, more specifically, because the supplier has not met respondents' terms for participation in the trade show. Thus, these provisions operate to frustrate nascent group boycotts by preventing respondents from interfering with supplier-franchisee transactions under specified circumstances.

All other objections raised to the order provisions relating to Count II have been considered and are denied.

Gibson, Sr. contends that the order provisions resulting from Count III violations are also overbroad, in that they are not limited to transactions in which he is a buyer, but include those in which he acts as agent or intermediary for a buyer. We see no infirmity in this extension; rather we view it as permissible fencing-in related directly to the conduct held to be illegal herein.

Such fencing-in is particularly appropriate in light of the interrelationship among respondents. At least since November 1, 1972, there has been an enhanced potential for [29]Gibson, Sr. to act as agent or intermediary for retail stores owned by other members of the Gibson family. Indeed, he owns no stores outright at this time, meaning that, leaving aside the possibility of treating all respondents as a "single enterprise," an order limited to Gibson, Sr. as a buyer might have little practical effect. Finally, it is not true, as Gibson, Sr. suggests, that the ALJ's finding that no liability attached to the Al Cohen transaction constituted a vindication for Gibson, Sr. in those circumstances where he was not a buyer, but merely an agent. The issue of Gibson, Sr.'s agency was not joined, for complaint counsel elected to try the case solely on the theory that Gibson, Sr. was a buyer. The ALJ's finding, therefore, does not bear on this question of order coverage.

All other objections raised to the order provisions relating to Count III have been considered and are denied.

Finally, respondents contend generally that no order should be issued, because the evidence is old and the practices found to be unlawful are isolated instances of misconduct. We do not agree. Respondents cannot and do not contend that the law violations were inadvertent or that these practices were voluntarily abandoned, even after issuance of the complaint. Given the nature and structure of their business operation, which remains essentially unchanged, and given the absence of any evidence of abandonment, we find that an order is necessary to combat a cognizable danger of recurrence of the violations.

To promote clarity, we have made numerous stylistic and grammatical changes to the order entered by the ALJ.

FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondents from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1–214, as amended, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

I.

It is ordered, That respondents Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, individually and/or as officers of corporate respondents; and corporate respondents Gibson's, Inc., Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, [2]Inc. and Gibson Products Co., Inc., their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation or franchising of any retailing business, or the operation of any business related to retailing in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to eliminate or boycott any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation; provided that nothing herein shall prevent respondents from acting collectively to further legitimate business decisionmaking with respect to businesses, including retail stores, which said respondents own collectively.

2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any other person, partnership or corporation.

3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any other person, partnership or corporation.

4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation because such supplier does not appear in shows conducted by the Gibson Trade Show.

5. Recommending, suggesting or advising any retailer or any other person, partnership or corporation not to deal with a supplier because such supplier does not appear in shows conducted by the Gibson Trade Show, or because such supplier is unwilling to meet the price, delivery, or billing terms demanded by respondent[s] or by any retailer or any other person, partnership or corporation.

II.

It is further ordered, That Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, [3]Jr., Gerald Gibson, Gibson Products Co., Inc., Gibson's Inc., Gibson's Discount Centers, Inc., their successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the purchase of merchandise, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Receiving or accepting, directly or indirectly, as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer, from any seller or seller's broker anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

2. Assuming control of or influencing any seller or seller's broker to induce such seller or seller's broker to pay to respondent[s] anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

III.

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

IV.

It is further ordered, That Count III of the complaint be, and it hereby is, dismissed as to respondents Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Al Cohen Associates, Inc.

V.

It is further ordered, That, for a period of 10 years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or [4]employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

COMMERCIAL LIGHTING PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3018. Complaint, May 6, 1980—Decision, May 6, 1980

This consent order requires, among other things, an Englewood, N.J. seller of light bulbs and other products to cease shipping or billing for unordered merchandise; soliciting orders from unauthorized persons; shipping goods that vary in quantity or price from that ordered; offering discounts or sending collection letters to induce payment for unordered merchandise; and transferring alleged delinquent accounts to debt collection agencies, after being informed that the merchandise had not been ordered. The firm is further prohibited from shipping merchandise pursuant to any unsigned purchase order. Should such a form be received, the company must mail to the "Lighting Buyer" of the business an acknowledgment card containing prescribed information and a toll-free number to call should problems arise. Additionally, the order requires that the firm develop and provide relevant personnel with an approved statement of operating principles and practices, and maintain a surveillance program designed to detect those who fail to conform.

Appearances

For the Commission: *G. Martin Shepherd.*

For the respondent: *Paul G. Pennoyer, Chadbourne, Parke, Whiteside & Wolfe,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Commercial Lighting Products, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act and the provisions of 39 U.S.C. 3009, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Commercial Lighting Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 East Palisade Ave., Suite 220, Englewood, New Jersey. Respondent is not a non-profit corporation or a charity.

PAR. 2. Respondent is now and for some time has been engaged in offering for sale, selling and distributing light bulbs and other products by soliciting orders by telephone and by personal contacts, shipping said products by mail and by common carriers to persons, business establishments, schools, educational and religious institutions and other entities (hereafter referred to as "persons" in this complaint), located in various States of the United States, under its corporate name and also through its division named AAA Lighting Products, Inc. Respondent therefore maintains and has maintained a substantial trade in said light bulbs and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act as amended.

PAR. 3. In the course and conduct of its business, respondent is now and for some time has been engaged in the following acts or practices:

(a) Distributing or causing to be distributed, light bulbs and other products to persons who have not requested or consented to the shipment of such products and, in connection with such shipments, failing to disclose to such persons that they may treat such products as gifts and that they have the right to retain, use, discard, or dispose of such products in any manner as they see fit without any obligation.

(b) Mailing or causing to be mailed, bills and collection letters to recipients of light bulbs and other products who did not request or consent to the shipment of such products.

The acts and practices set forth above were and are unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent is now and for some time has represented, contrary to fact, that:

(a) Persons who do not pay for light bulbs or other products will have their alleged delinquent accounts referred to an attorney, debt collection company, credit bureau, or credit reporting agency.

(b) Respondent will adversely affect the credit rating of persons with alleged delinquent accounts.

(c) Failure to accept delivery of respondent's products will result in the persons being liable for storage charges or other charges assessed by common carriers attempting to deliver such products.

Such acts or practices were and are deceptive.

PAR. 5. Respondent's representatives have contacted janitors, custodians, maintenance personnel and other persons in various business establishments and institutions and represented themselves, contrary to facts, as being friends or acquaintances of such persons or as salesmen who have supplied said business establishments and institutions with products in the past or represented that they contacted such persons for the purpose of offering them free gifts, and, in a significant number of instances, have not attempted to determine whether such persons were authorized to order products in the amount of the orders solicited. Such acts and practices have been, and are, deceptive.

Par. 6. Respondent has induced and attempted to induce persons employed by various business establishments and institutions to consent to the shipment of light bulbs or other products by falsely representing that said persons would receive a small number of light bulbs or other products on approval or that such persons would receive only an amount sufficient to cover the shipment of free gifts that would be sent to such persons, or that such persons would receive only a small number of light bulbs or other products to insure that they would not exhaust their existing supply of light bulbs or other products before deciding to order additional products from respondent, when in fact persons who agreed to accept allegedly small quantities of light bulbs or other products received, in a significant number of instances, large quantities of light bulbs or other products for which they or their business establishments or institutions were subsequently billed substantial amounts of money whether or not they agreed to accept or retain said products. Such acts and practices have been, and are, unfair or deceptive.

Par. 7. Respondent has, in a significant number of instances, sent light bulbs or other products in quantities substantially larger than quantities ordered or at prices substantially higher than prices quoted to the persons who ordered said products. Such acts and practices have been, and are, unfair and deceptive acts and practices.

Par. 8. Respondent's "verifiers" and other employees have telephoned business establishments and institutions that allegedly ordered light bulbs or other products to allegedly confirm orders that were in fact never made and respondent has, in a significant number of instances, not made good faith efforts to resolve complaints from business establishments and institutions that have complained that they did not order merchandise allegedly ordered or that they received unordered merchandise or overshipments from respondent or shipments of bulbs or other products from respondent at prices higher than previously quoted. Instead, respondent has misrepresented, in a significant number of instances, that shipments complained about were shipped according to bona fide orders or that said orders were verified before shipment or that the complainants would have to resolve their disputes with respondent's salesmen who respondent alleged were independent contractors for whose actions respondent is not responsible or respondent has offered discounts to induce persons to accept, retain, or pay for the products. Such acts and practices have been, and are, unfair or deceptive acts and practices.

PAR. 9. Respondent has, as aforesaid, used unfair or deceptive acts and practices to induce business establishments and institutions to accept or retain unordered merchandise and merchandise priced higher than represented at the time it was ordered and to pay to respondent substantial sums of money for said merchandise. Respondent has received said sums of money and has failed to refund or offer to refund said money. The use by respondent of said acts and practices and the continued retention of said sums of money are unfair or deceptive acts and practices.

PAR. 10. Respondent, which has been in substantial competition in commerce with corporations, firms and individuals engaged in the sale of light bulbs and other products, has used, as aforesaid, unfair and deceptive acts and practices to induce persons, business establishments and institutions to retain or accept and pay for said products.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, have been and are all to the prejudice and injury of the public and are in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act or the provisions of 39 U.S.C. 3009.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and Section 3009 of the Postal Reorganization Act (39 U.S.C. 3009); and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Commercial Lighting Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 East Palisade Ave., in the City of Englewood, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

As used in this order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting directly or indirectly and by any manner or means.

The provisions of this order are applicable to the acts and practices of Respondent, Commercial Lighting Products, Inc., a corporation, through its agents, representatives and employees and its successors and assigns which are in the lighting business, or through any successor corporation, assign, subsidiary, division, franchisee or other device in connection with the advertising, offering for sale, sale or distribution of light bulbs or other Products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

For purposes of this order the following definitions shall be applicable:

"Person" shall mean a recipient of Products from the Respondent or the recipient of any telephonic, written or other type of communication from Respondent in connection with the advertising, offering for sale or sale of Products, as defined. *Provided, however,* that Person shall not mean a natural person, business establishment or institution which does not purchase said Products for consumption (*i.e.*, independent jobbers or wholesalers).

"Respondent" shall mean Commercial Lighting Products, Inc. through its agents, representatives, employees and its successors and assigns, which are in the lighting business, or through any successor corporation, subsidiary, division, franchisee or other device. It shall not include Respondent's Canadian subsidiary or any other foreign subsidiary, division or franchisee, if they do not sell substantial amounts of Products to Persons in the United States. In addition, Respondent shall not mean any unrelated wholesalers, jobbers or persons not affiliated with Respondent, nor shall any part of this order be construed to include the acts or practices of such persons. *Provided further*, that Respondent shall not mean a successor to, or assign of, Commercial Lighting Products, Inc. into which Commercial Lighting Products, Inc. is liquidated pursuant to Section 332 of the Internal Revenue Code, where such successor or assign in good faith receives distributions in complete liquidation of Commercial Lighting Products, Inc. and such successor or assign no longer carries on the business of Commercial Lighting Products, Inc. in any way.

"Products" shall mean light bulbs, fluorescent tubes or any lighting equipment or any other merchandise currently sold by Commercial Lighting Products, Inc. or sold by Commercial Lighting Products, Inc. in the future.

"Shipping" shall mean sending, or causing to be sent, any Products by mail or by any carrier or by any means.

I

It is ordered, That Respondent cease and desist from:

1. Shipping Products or causing Products to be shipped, without the expressed request or consent of a Person.
2. Mailing, or causing to be mailed, a bill to a Person for Products which have been shipped without the prior expressed request or consent of the Person.
3. Soliciting an order for Products from any Person without first making a good faith effort to determine whether such Person is authorized to order said Products in the dollar amount of said order.
4. Shipping Products to a Person in larger quantities than ordered or at prices greater than prices quoted at the time of the order.
5. Offering discounts to induce Persons who allege that they received unordered Products from Respondent to accept, retain, or pay for said Products until after a bona fide effort has been made to ascertain whether or not the Products were unordered.
6. Shipping, or causing to be shipped, a collection letter to a Person to whom Products have been shipped without the prior expressed request or consent of such Person.
7. Transferring, or causing to be transferred, to a debt collection company, credit bureau or any credit reporting agency, the alleged delinquent account of a Person who has informed Respondent that the

Products involved were not ordered, until after a bona fide effort has been made to ascertain whether or not the Products were unordered.

Provided, however, that Respondent may act in accordance with the exceptions set forth in the Postal Reorganization Act, 39 U.S.C. 3009, as amended or modified.

Provided further, however, that for purposes of this order, no Products shall be deemed to have been shipped without the prior expressed request or consent of a Person if the procedures outlined below in Parts III and IV of this order have been complied with and the acts enjoined in Part II of this order have not been committed in connection with the shipping of such Products.

II

It is further ordered, That Respondent cease and desist from representing that:

1. The individual contacting a Person being solicited is a friend or acquaintance or has been referred by another individual in the business or institution of the Person solicited or that Respondent has supplied light bulbs or other Products to such Person or such Person's business establishment or institution in the past unless such is the fact.

2. Any Person from whom an order for Products is solicited is being contacted for the purpose of offering him a free gift unless such is the fact.

3. The quantity or price of Products that will be shipped by Respondent in connection with soliciting any Person's consent to receive said Products is less than the quantity or the price of the Products that will be shipped. However, Respondent shall not be deemed to have violated this subsection if it shows that such quantity or price variance was the result of a clerical error.

4. Respondent will send or has sent a notice of an alleged delinquent account to a debt collection company, credit bureau, credit reporting agency, attorney or other individual or entity unless such is the fact.

III

It is further ordered, That:

1. Respondent shall not mail or otherwise ship Products pursuant to any order which does not include on the order form, in addition to any other information, the following information in legible form: (a) the name of the individual who ordered the Products; (b) the job title

of the individual who ordered the Products; (c) the quantity of each item ordered; (d) the unit price of each item and the total price of the order; (e) the date said individual ordered the Products; (f) whether the order was taken on the telephone or in person; (g) whether the individual placing the order signed the order; (h) whether the individual placing the order has received a copy of the order; (i) the name of the salesman or other individual who wrote the order; and (j) whether the individual who ordered the Products states that he has ordered any such Products from Respondent in the past.

2. Respondent will utilize an "Acknowledgment" form which will be addressed to the attention of "Lighting Buyer" of the Person in question, which will contain the information required by items (a) through (j) of Part III, paragraph 1 above, and a notice that if there is any problem with the order, the Person may call Respondent on a free "800" telephone number listed conspicuously on the Acknowledgment. The Acknowledgment will be sent by first class mail to the Person. Respondent will not ship Products to the Person within ten days after mailing of the Acknowledgment. (A representative copy of the Acknowledgment form is attached hereto as Appendix A.)

3. Respondent shall not ship Products to any Person who informs Respondent, before said Products are shipped, that the merchandise allegedly ordered was not ordered.

Provided, however, that the provisions of paragraphs 1-3 above shall not apply where Respondent has received a signed order from a Person on the Person's purchase order or similar form.

4. Respondent shall retain for a period of two (2) years each written communication of the type referred to in Part III, paragraph 2 of this order and each letter sent by Respondent in response to any communication of the type referred to in Part III, paragraph 3 of this order, as well as all other written complaints alleging receipt of unordered merchandise, and shall make said communications and letters available to the Commission's staff for inspection and copying upon request.

IV

It is further ordered, That:

1. Respondent adopt a Statement of Operating Principles and Practices ("Statement") as set forth in Appendix B, and deliver a copy of this Statement to each of its employees, salesmen, agents, solicitors, problem solvers, collectors, customer service personnel and all other individuals who communicate with Persons in connection with the

offering to sell or the terms of sale of Respondent's Products to Persons, the requesting of payment, or the handling of complaints that Products shipped were allegedly unordered.

2. Respondent provide each individual described in Part IV, paragraph 1 of this order with a form to be signed and returned to Respondent, clearly stating his intention to be bound by and to conform his business practices thereto during the period said individual is so engaged and for a period of two (2) years thereafter, and make said forms available to the Commission's staff for inspection and copying upon request.

3. Respondent will not use or engage or will terminate the use or engagement of any such individual described in Part IV, paragraph 1 of this order who does not sign said Statement.

4. Respondent discontinue dealing with or terminate the use or engagement of any individual described in Part IV, paragraph 1 of this order who continues on his own any act or practice prohibited by this order.

5. Respondent shall forthwith distribute a copy of this order to each of its divisions or subsidiary corporations that is involved in the offering for sale, sale or distribution of Products to Persons.

6. Respondent institute a program of continuing surveillance satisfactory to the Commission designed to reveal whether the individuals described in Part IV, paragraph 1 of this order are conforming to the requirements of this order as incorporated in the Statement.

V

It is further ordered, That:

1. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising from this order.

2. Respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

[letterhead
with return address]

ACKNOWLEDGMENT OF ORDER

TO: Lighting Buyer
____
____

Items Ordered	Quantity	Unit Price	Total

Total Price of Order __________

Order placed by ____
Title of individual who placed order ______________________________
Date of order ____
Order was placed (circle one): In Person By Telephone
Did individual placing the order sign it? Yes No
Did individual placing the order receive a copy of it? Yes No
Name of salesperson or other person who wrote the order
____

Did the individual who placed the order state that she/he had ever ordered any such products from Commercial Lighting Products, Inc., AAA Lighting or Pennstar in the past?

IMPORTANT: IF THERE IS ANY PROBLEM WITH THIS ORDER, YOU MAY CALL US TOLL FREE AT 800-xxx-xxxx.

APPENDIX B

COMMERCIAL LIGHTING PRODUCTS, INC.

STATEMENT OF OPERATING PRINCIPLES AND PRACTICES

As an employee of Commercial Lighting Products, Inc. ("CLP") you should know the Principles and Practices upon which CLP operates and expects its employees to operate.

The success of CLP is based on customer good will and belief in CLP's products. Unfair and unethical sales practices undercut this success, and will not be tolerated by CLP.

Specifically, the following acts or practices are both unethical and unlawful, and will not be tolerated by CLP:

1. The sending of products without the expressed request or consent of the customer.
2. Sending a bill to a customer for products that have been shipped without the prior expressed request or consent of the customer.
3. Soliciting an order for products from any potential customer without first making

a good faith effort to determine whether such person is authorized to order products in the dollar amount of the order.

4. Sending products to a customer in larger quantities than ordered or at prices greater than prices quoted at the time of the order.

5. Offering discounts to induce customers who say they received unordered products from CLP to accept, retain, or pay for the products, until after a bona fide effort to ascertain whether or not the products were unordered.

6. Sending a collection letter to a customer for products which have been shipped without the prior expressed request or consent of the customer.

7. Transferring in any way to a debt collection company, credit bureau or any credit reporting agency, a delinquent account of a customer who has informed CLP that the products involved were not ordered until after a bona fide effort to ascertain whether or not the products were unordered.

8. Telling a potential customer that the individual contacting the customer is a friend or acquaintance or has been referred by another individual in the business or institution of that potential customer, or stating that CLP has supplied light bulbs or other products to the potential customer or the potential customer's business establishment or institution in the past unless such is the fact.

9. Telling a potential customer that he or she is being contacted for the purpose of offering him or her a free gift unless such is the fact.

10. Telling any potential customer the quantity or price of products that will be shipped by CLP is less than the quantity or the price of the products that will be shipped.

11. Telling any customer that CLP will send or has sent a notice of an alleged delinquent account to a debt collection company, credit bureau, credit reporting agency, attorney or other person or entity unless such is the fact.

In addition, CLP requires that an order shall not be mailed or shipped unless the order is legibly written on a properly completed CLP order form, or CLP receives a signed order on the customer's purchase order or similar form.

Furthermore, those CLP procedures which make it obligatory that CLP not ship products to a customer until 10 days after the mailing of the CLP "Acknowledgment" form, must be strictly adhered to. It is CLP's policy to keep these Acknowledgment forms.

Finally, it is also CLP's policy to keep all correspondence between CLP and persons who say they received unordered merchandise from CLP. If you engage in any such correspondence or have custody of any such correspondence, you must not destroy it unless CLP gives you authority to do so in writing.

These procedures and practices are required by CLP and are mandatory. You will be discharged if you do not adhere to them.

I will be bound by this Statement of Operating Principles and Practices and will act accordingly.

Date: ______________________

IN THE MATTER OF

BELL & HOWELL COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9099. Complaint, May 27, 1977—Decision, May 8, 1980

This consent order requires, among other things, a Lincolnwood, Ill. seller of home study courses and its subsidiary to cease misrepresenting admission criteria, potential earnings, employment opportunities, and the need or demand for their graduates. The firms are further prohibited from misrepresenting the effectiveness of their job placement service; that experience is not necessary or advantageous in obtaining employment; that their courses are endorsed by a governmental agency; and that students are provided with instructional assistance. The order also requires respondents to make prescribed disclosures regarding the job success of previous students; the manner in which contracts can be cancelled; and the method used to calculate tuition obligations should a student drop out of a course. Additionally, Bell & Howell is required to deposit in an escrow account the sum of $1.2 million to provide refunds for former eligible students.

Appearances

For the Commission: *Brian Hennigan, Carlton Lowe,* and *David Marx, Jr.*

For the respondents: *Samuel Weisbard, Bruce Schoumacher* and *William A. Cerillo, McDermott, Will & Emery,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bell & Howell Company, a corporation, and Bell & Howell Schools, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bell & Howell Company, (hereinafter sometimes referred to as BHC), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 7100 McCormick Ave., Lincolnwood, Illinois.

Respondent Bell & Howell Schools, Inc., (hereinafter sometimes referred to as BHS), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4141 West Belmont Ave., Chicago, Illinois. Respondent BHS is a wholly-owned subsidiary of respondent BHC.

The aforementioned respondents have cooperated, and acted together in carrying out the acts and practices hereinafter set forth. Respondents BHC has known of, condoned and approved, expressly or tacitly, the acts and practices of respondent BHS hereinafter set forth. Respondent BHC is materially and financially interested in and responsible for respondent BHS. BHC has received monies from BHS flowing from the acts and practices set forth herein.

Par. 2. Respondents have been engaged for some time last past in the advertising, promotion, formulation, offering for sale, sale and distribution of resident training and home study courses to the public purported to prepare completing students thereof for employment, advancement or increased earnings in the fields of accounting, television repair, electronics, and other related career fields. The home study courses consist of a series of home study lessons pursued by correspondence through the U.S. mails. The resident training programs consist of a series of lessons similar in content and purpose to the home study courses. The violations alleged in this complaint relate to the acts and practices of respondents in connection with their home study program.

Further, for the purpose of enabling students to finance respondents' home study courses, respondents have arranged or assisted in the arrangement of credit and deferred payment terms and in the application for benefits under the Veterans Educational Assistance Act, 38 U.S.C. 1651, et seq. ("VEAA"), and federally insured student loans under the Higher Education Resources and Student Assistance Act, 20 U.S.C. 1071, et seq. ("FISLP"). Respondents have accepted the revenues and proceeds flowing therefrom.

Further, respondents have engaged in recruitment of employees by means of advertisements in printed media of general circulation, and through other means, whereby members of the general public are induced to accept employment under written agreements and compensation schedules as members of respondents' sales force.

Par. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and caused to be disseminated, by means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, certain advertisements concerning the home study courses including, but not limited to, advertisements inserted in newspapers and magazines of general interstate circulation, and by means of brochures, pamphlets and other promotional materials disseminated through the United States mails, and by other means, for the purpose of obtaining leads or prospects for the sale of such home study courses, for the purpose of inducing the purchase of such home study courses, and for the purpose of recruiting and inducing the acceptance of employment by sales force members. Respondents' sales force members have visited prospective purchasers throughout the various states to induce the purchase of respondents' home study courses. Respondents have transmitted and received, and caused to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of such home study courses, and in the course of advertising, recruiting, and inducing employment of sales force members, lessons and equipment from the home study courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies, and other business papers and documents, to and from prospective students, students, prospective sales force members, and sales force members, located in various States of the United States, other than the state of origination.

Respondents, at all times mentioned herein, have maintained a substantial course of trade in said home study courses and recruitment of sales force members in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PART I

PAR. 4. In the course and conduct of their aforesaid business, for the purpose of obtaining leads or prospects for the sale of their home study courses and inducing the purchase of such home study courses, respondents have made numerous statements and representations in magazines, newspapers, and other media, regarding opportunities for employment or advancement, occupational demand, earnings potentials, the placement assistance furnished to students completing respondents' home study courses, the instruction and assistance available to students, and other matters.

In the further course and conduct of their aforesaid business, respondents have caused persons who respond to their advertisements to be visited by respondents' sales force members in the homes of such persons. For the purpose of inducing the sale of respondents' home study courses, such sales force members have made to prospective purchasers many statements or representations, directly or by implication, as enumerated above in this paragraph. In addition, such sales force members have made representations, directly or by implication, regarding entry level wages and salary potentials, content and degree of difficulty of home study courses, contract terms and financing arrangements, VEAA benefits and FISLP loans, and other matters. Some of the aforesaid statements and representations have appeared in brochures and other printed materials furnished by respondents to sales force members, and other statements and representations have been made orally by such sales force members to prospective purchasers.

PAR. 5. By and through the use of the aforesaid statements and representations respondents have represented, directly or by implication that:

1. There is an urgent need or demand for students who complete respondents' home study courses in the positions and career fields for which respondents train such students.
2. Students completing respondents' home study courses receive high wages or salaries from employment in the positions or career fields for which respondents train such students.
3. A substantial proportion of students completing respondents' home study courses obtain employment through respondents' placement service.
4. Respondents are selective in enrollment.
5. A high school education or its equivalent is sufficient for admission and successful completion of respondents' home study courses.
6. Help sessions are available to respondents' home study students at regular and frequent intervals and provide personalized instruction and assistance.
7. Instruction and assistance from instructors are readily available to home study students through telephone services provided by respondents.
8. Respondents' home study electronics courses are simple and involve primarily manual skills.

PAR. 6. In truth and in fact:

1. In many instances there is not an urgent need or demand for students completing respondents' home study courses in the positions or career fields for which respondents train such students.
2. In many instances students completing respondents' home study courses do not receive high wages or salaries from employment in positions for which respondents train such students.
3. A substantial proportion of students completing respondents' home study courses do not obtain employment through the placement service offered by respondents.

4. Respondents are not selective in enrollment; to the contrary, respondents require few qualifications of prospective students and accept all or most persons for enrollment in such courses who are willing to execute a contract to pay for such home study courses.

5. In many instances a high school education or its equivalent is not sufficient for successful completion of respondents' home study courses.

6. In many instances help sessions are not available to respondents' home study students at regular and frequent intervals and do not provide personalized instruction and assistance.

7. In many instances instruction and assistance from instructors are not readily available to home study students through telephone services provided by respondents.

8. Respondents' home study electronics courses are not simple and do not involve primarily manual skills.

Therefore, the statements and representations in Paragraphs Four and Five were and are false, misleading, deceptive or unfair acts or practices.

PAR. 7. Respondents have offered for sale home study courses and have accepted students for enrollment on the basis of a high school education or its equivalent, without disclosing to prospective students:

1. That certain aptitudes or background are requisite for successful completion of such home study courses;

2. That a high school education or its equivalent does not necessarily insure that the prospective student has such requisite aptitudes or background; and

3. That respondents do not test or screen home study students to determine whether such students actually have the requisite aptitudes or background.

Disclosure of such facts to home study students would indicate to such students the significance of respondents' admission requirements and the probability of their completing such home study courses. Thus, respondents have failed to disclose material facts which, if known to certain prospective students, would be likely to affect their consideration of whether to purchase such home study courses.

Therefore, the aforesaid acts and practices were and are false, misleading, deceptive or unfair acts or practices.

PAR. 8. In the course of offering for sale and selling home study electronics courses, respondents have emphasized fun, simplicity and manual training, while understating, obscuring and failing to disclose the significance, nature and extent of written lessons and instructional material involved in such courses. The aforesaid representations and non-disclosures have deceived students with respect to the content and nature of home study electronics courses. Therefore, the aforesaid acts and practices were and are false, misleading, deceptive or unfair acts or practices.

PAR. 9. Through the use of the aforesaid advertisements, materials, oral presentations and otherwise, and for the purpose of inducing the purchase of home study courses, respondents have degraded, debased or disparaged the present or potential career opportunities, education and training, self-image or other personal characteristics of prospective students. Further, respondents have represented, directly or by implication, that such prospective students can alter or improve such personal characteristics through respondents' home study courses.

The effect of the aforesaid disparagements and representations has been to aggravate and continue the unfair and deceptive effect of the acts and practices set forth herein. Therefore, the aforesaid acts and practices of respondents were and are unfair acts or practices.

PAR. 10. In the further course and conduct of their aforesaid business, respondents have assisted prospective students in making application or contracts for enrollment, deferred payment financing, benefits under VEAA, and loans under FISLP. In many instances respondents have made false, misleading or deceptive representations, directly or by implication, relating to the information, terms, conditions and obligations contained in such contracts, applications and agreements or remaining thereunder upon termination of enrollment. In many instances respondents have failed to fully explain and disclose material facts regarding the terms and conditions of such forms and agreements.

The aforesaid acts of respondents have deceived students with respect to the nature, terms and conditions of contractual obligations, veterans educational benefits, Federally Insured Student Loans, and other consequences of the contracts, applications and agreements.

The deceptions resulting from the acts or practices described in this Paragraph Ten are continuing, in many instances, through the period of the students' enrollment and comcomitant deferred payment obligations.

Therefore, the aforesaid acts and practices of respondents were and are false, misleading, deceptive or unfair acts or practices.

PAR. 11. In the further course of their aforesaid business, and at all times mentioned herein, respondents have offered for sale home study courses intended to train students for employment in certain positions or career fields without disclosing in their advertising and printed material or through their sales force members:

1. the percentages of students recently completing the home study courses who were able to secure employment in the positions or career fields for which they were trained;
2. the initial salary received by such completing students; and
3. the percentage of recent students for each home study course offered that have failed to complete their courses of instruction.

Knowledge of such facts by prospective students of respondents' home study courses would indicate that a significant number of students have not completed such courses and not secured employment. Thus, respondents have failed to disclose material facts which, if known to certain prospective students, would be likely to affect their consideration of whether to purchase such home study courses.

Therefore, the aforesaid acts and practices were and are false, misleading, deceptive or unfair acts or practices.

PAR. 12. In the further course and conduct of their aforesaid business, and in furtherance of their purpose of inducing prospective students to execute enrollment contracts for the purchase of their home study courses, respondents and their employees, sales force members, and representatives, through the use of the false, misleading and deceptive statements, representations and practices set forth herein in this complaint, have induced prospective students to execute enrollment contracts and deferred payment financing agreements upon initial contact without affording such students sufficient time to carefully consider the purchase of the home study course or the financing thereof. Therefore, the aforesaid acts and practices were and are unfair acts or practices.

PAR. 13. In the further course and conduct of their aforesaid business, respondents have made representations and entered into contracts with home study students whereby respondents are obligated to provide and deliver, and such students are entitled to receive, in accord with their progress through the course, lessons and examinations, laboratory materials and equipment, tuition refunds upon cancellation, and certain services including, but not limited to, grading of lessons and examinations, and instruction or assistance through help sessions and telephone services. In many instances respondents have failed to provide or deliver such lessons, examinations, laboratory materials, equipment, tuition refunds and other services to home study students in a timely manner and in accord with the terms of the aforesaid contracts and representations. Such failures and delays on the part of respondents have impeded such students in their efforts to derive benefit from and progress through such home study courses and have resulted in inconvenience, expense and financial detriment to such students. Therefore, the aforesaid acts and practices of respondents were and are unfair acts or practices.

PAR. 14. Through the false, misleading, deceptive, and unfair acts or practices herein set forth in this complaint, respondents have induced students and other persons or entities to pay, or contract to pay, to respondents substantial sums of money to purchase or pay for respondents' home study courses. In many instances such monies were paid to and received by respondents although such courses were of little value to students. Respondents have received the aforesaid monies and have failed to offer or refund such sums to, or to rescind the contractual obligations of, many students and other persons or entities participating in the financing of such home study courses.

By inducing students and other persons or entities to pay, or contract to pay, to respondents substantial sums of money for respondents' home study courses where such home study courses are of little value to students and by failing to offer or refund such sums to, or to rescind the contractual obligations of many students and other persons or entities where such courses are of little value, respondents have engaged in unfair acts and practices.

Therefore, the said acts or practices constitute unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act.

PART II

PAR. 15. In the further course and conduct of their business as aforesaid, respondents have recruited and induced members of the general public to accept employment under written agreements and to sell respondents' home study courses. In the course of such recruitment respondents have published or caused to be published advertisements in newspapers of general and interstate circulation throughout the United States and have made oral presentations through their agents, representatives, and employees. Through such publications, advertisements, oral presentations and otherwise, respondents have made statements and representations, directly or by implication, respecting earnings potential, sales territory, job security, sales quotas, company-generated leads and other terms of the employment relationship in order to induce individuals to accept employment in respondents' sales force and to sell home study courses on behalf of respondents.

PAR. 16. Furthermore, respondents have, through the acts and practices described herein, recruited and induced persons to accept employment in respondents' sales force and to enter into, as a condition of such employment, written agreements and compensation schedules, which include the following termination provisions, in substance:

1. Employment under this schedule may be terminated by either party at any time.

2. Termination of the representatives' employment with the company will cause this (compensation) schedule to be cancelled and no amounts will be considered earned or accrued after the last day of active employment, as shown by the company records, unless termination is for one of the following reasons: death, retirement (as defined by the Bell & Howell profit sharing trust), or permanent total disability (as defined by the Bell & Howell group insurance master policy).

Through such contracts respondents have retained and exercised the power to unilaterally and substantially alter the terms of the employment relationship and the compensation received by sales force members. Included among such unilateral powers and practices, but not all inclusive thereof, are the following:

1. Respondents have arbitrarily and without cause denied, altered or periodically withheld sales leads from sales force members, thereby hindering such sales force members in obtaining enrollments and fulfilling the sales quotas or other performance requirements set by respondents.

2. Respondents have arbitrarily and unilaterally altered or increased the sales quotas and performance requirements.

3. Respondents have arbitrarily and unilaterally altered and reformed the commission schedule and other payment schedules, for the purpose of inducing or coercing such sales force members to fulfill increasingly higher sales quotas and other performance requirements.

4. Respondents have used various threats and forms of coercion against their sales force members, including but not limited to probation, termination, and restriction of sales leads, to coerce sales force members to comply with sales quotas and performance requirements.

As a result of the aforesaid powers and practices, respondents have, in many instances, induced or coerced sales force members to terminate employment; and respondents have thereby caused such terminated sales force members to forfeit earned compensation in accordance with the terms and conditions of the written agreements and compensation schedules.

The failure of respondents to make payment of earned compensation to sales force members at termination does unjustly enrich respondents and is unfair.

Therefore, the said acts and practices constitute unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act.

PAR. 17. At the time of the false, misleading, deceptive, and unfair acts or practices set forth in this complaint, and as a result thereof, respondents have received certain complaints, reports and information from their home study students, sales force members and other persons, and from surveys and studies conducted by or on behalf of respondents, which indicated or reported the occurrence, causes, or results of such acts or practices. At the time of such complaints, reports or information respondents were engaged in the courses of conduct and business behavior herein set forth in Paragraphs Fifteen and Sixteen of this complaint.

Respondents have received the aforesaid complaints, reports and information and have continued to engage in the aforesaid courses of conduct and business behavior and have continued to enroll large numbers of home study students.

PAR. 18. The effect of the courses of conduct and business behavior set forth in Paragraph Fifteen through Seventeen herein, and the continuation of such conduct and business behavior, has been to aggravate and continue the unfair and deceptive effect of the acts and practices of respondents as alleged in Parts I and III of this complaint.

Therefore, engaging and continuing in such courses of conduct and business behavior is an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act.

PART III

PAR. 19. In the further course and conduct of their aforesaid business, respondents have advertised and promoted the availability of educational benefits under the Veterans Educational Assistance Act, 38 U.S.C. 1651, et seq. ("VEAA"), as an inducement to veterans to purchase and pay for respondents' home study courses. Said Act allows each eligible veteran to "select a program of education to assist him in attaining an educational, professional or vocational objective at any educational institution (approved in accordance with the terms of the Act) selected by him." 38 U.S.C. 1670. Rules promulgated by the Veterans Administration to carry out the policy and purposes of the VEAA further provide that programs of education will be approved for veterans educational benefits where "the veteran is not already qualified for the objective for which the program of education is offered." 38 C.F.R. 21.4230.

In their advertisements, materials, oral presentations and otherwise, respondents have stressed non-vocational themes or benefits and have emphasized monetary benefits available through VEAA from enrollment in respondents' home study courses.

Respondents have made such representations and have assisted veterans in making application for VEAA benefits, while misrepresenting or failing to disclose to such veterans the vocational objectives and requirements for use of such benefits. Respondents have thereby induced veterans to enroll and to use their VEAA benefits for respondents' home study courses.

The effect of the aforesaid acts or practices has been to aggravate and continue the unfair and deceptive effect of the acts and practices of respondents set forth in Part I of this complaint. Such acts or practices violate the spirit and purpose of the VEAA and rules promulgated thereunder, are contrary to public policy, and were and are unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act.

PAR. 20. Through the false, misleading and deceptive acts or practices, and the unfair acts and practices herein set forth in this complaint, respondents have induced or arranged the application and use of monies available under VEAA to purchase or pay for respondents' home study courses. In many instances monies available under VEAA were paid over and received by respondents in contradiction of the vocational policies, purposes or requirements of said Act or rules thereunder. As a result, the eligibility of such students for VEAA benefits was diminished, depleted or expired; and such students lost the opportunity to attain an educational, professional or vocational objective from use of their VEAA benefits, as contemplated by said Act.

The use by respondents of the aforesaid acts and practices, their continued retention of VEAA funds where the policies, purposes or requirements of the VEAA or rules thereunder are contradicted, does unjustly enrich respondents.

Therefore, the said acts or practices constitute unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act.

PAR. 21. By and through the use of the aforesaid acts and practices, respondents have placed in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner hereinabove alleged.

PAR. 22. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of members of the general public in the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' courses or to accept employment under written agreements and to sell home study courses for the benefit of respondents by reason of said erroneous and mistaken beliefs.

PAR. 23. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their counsel, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Bell & Howell Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 7100 McCormick Ave., Lincolnwood, Illinois.

Respondent Bell & Howell Schools, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Illinois, with its principal office and place of business located at 2201 West Howard, Evanston, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Bell & Howell Company, a corporation, and Bell & Howell Schools, Inc., a corporation, their successors and assigns and their agents, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, franchise or other device in connection with the advertising, promoting, offering for sale, sale or distribution of home study courses, home study training or home study instruction in the fields of accounting, television repair, electronics, or any other subject, trade or vocation in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, orally, visually, in writing or in any other manner, directly or by implication, that:

(a) There is a significant or substantial need or demand for persons completing any of respondents' courses offered in the fields of accounting, television repair, electronics, or any other field or otherwise representing that significant or substantial opportunities for employment, or significant or substantial opportunities of any other type, are available to such persons, or that persons completing said courses will or may earn a specified amount of money, or otherwise representing by any means the prospective earnings of such persons, unless such representations are accompanied by a written disclosure form which contains the following information under the heading "Placement Record" in the format prescribed in Appendix A and for the most recently completed base period designated as described in Appendix B:

(1) the number and percentage of graduates who, within four months of leaving the course, obtained employment in jobs for which the course prepared them;

(2) the number of these graduates by their yearly gross salary, in increments of two thousand dollars ($2,000);

(3) the percentage of these graduates within each salary increment to the total number of graduates;

(4) at its option, the number and percentage of these graduates who refused to provide salary information.

Provided, however, that this subparagraph (a) shall be inapplicable to any course newly introduced by respondents until such time as the new course has been in operation for the base period established pursuant to Appendix B as prescribed in this paragraph. However, during such period the following statement, and no other, shall be made in lieu of the Appendix A Disclosure Form required by this paragraph:

DISCLOSURE NOTICE

Because this course is new, we can't tell you how our previous students did or about your chances of getting a job when you finish.

All we can talk about is the general demand for people in the field we train you for. But this demand may be higher or lower in the area where you live, and it can change in the future. Or you may need some past experience in the field. We suggest you speak to a counselor or state employment office about these things.

(b) Experience is not required or advantageous for employment in the field of accounting, television repair, electronics, or any other field, or misrepresenting in any manner the qualifications or requirements necessary to obtain employment in the fields of accounting, television repair, electronics or any other field.

2. Misrepresenting orally, visually, in writing or in any other manner, directly or by implication:

(a) The employment prospects of respondents' graduates or the ease with which respondents' graduates will obtain employment.

(b) The types of jobs available to respondents' graduates, or that there will be job security or steady employment for respondents' graduates in positions for which respondents train such persons.

(c) The effectiveness or the success of the placement service offered by respondents in placing their graduates in positions in the fields of accounting, television repair, electronics, or any other field.

(d) That the placement service offered by respondents has names of employers seeking respondents' graduates in the fields of accounting, television repair, electronics, or any other field; or misrepresenting in any manner the capabilities, functions or service offered by respondents' placement service.

3. Representing orally, visually, in writing or in any other manner, directly or by implication, that:

(a) Help sessions are available or personalized instruction and assistance are provided to respondents' home study students, unless, regarding help sessions, any representation is accompanied by a statement which clearly and fully discloses the time, dates, and locations of help sessions scheduled for the location in which such representation is made for the 12-month period immediately following such representation; *provided, however,* that if any changes are made in the time or location of help sessions, all students shall be notified of such changes within 30 days.

(b) Instruction or assistance is available to home study students through telephone services provided by respondents, unless any representation regarding telephone services is accompanied by a statement which clearly and fully discloses the time of operation of such telephone services, discloses whether use of such telephone service is at the student's expense, and informs the student that incoming telephone lines might be busy.

4. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee in any course of instruction offered by respondents, the admission criteria, if any, required for enrollment in the school, the number of written lessons required to be submitted by the student, the educational or occupational background needed for successful completion of the course, and if a representation is made that equipment will be furnished in the course, the number of written lessons that must be completed before the student receives any equipment furnished in the course.

5. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee in any accounting course offered by respondents, the following information in the following form:

(a) The title "IMPORTANT INFORMATION" printed in ten (10) point bold face type across the top of the form.

(b) Paragraphs providing the following information:

(1) Many employers of accountants require accountant-applicants to have a college degree or prior work experience in the field of accounting.

(2) Many employers of accountants give preferential consideration in hiring to accountant-applicants who are Certified Public Accountants (CPAs). Each of the 50 states has different requirements for the CPA examination. Before you enroll in this course, be sure to check with the Secretary of the State Board of Accountancy of your state to determine whether, after you've graduated from this course, you will be qualified to take the CPA examination.

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6. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee in any television repair or electronics course offered by respondents, the following information in the following form:

(a) The title "IMPORTANT INFORMATION" printed in ten (10) point bold face type across the top of the form.

(b) Paragraphs providing the following information:

(1) Many employers of television repairmen or electronics technicians require applicants to have additional educational experience and/or previous occupational experience in the field of electronics.

(2) If you intend to open your own television or electronics entertainment equipment repair shop, you may need more training and experience than this course will give you.

7. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice which substantiate the data and information required to be disclosed by Part I, Paragraphs 1(a) and 8 of this order and prescribed in Appendix A.

8. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee in any course of instruction in the fields of accounting, television repair, electronics or any other subject, trade or vocation offered by respondents, the following information in the format prescribed in Appendix A and for a base period designated as described in Appendix B:

(a) the number of students who enrolled in that period;

(b) the number and percentage of such students who were graduated during that period;

(c) the number and percentage of such students whose course of study was terminated during that period; and

(d) The number and percentage of such students who remained actively enrolled at the end of that period.

9. (a) Contracting for the sale of any course of instruction in the field of accounting, television repair, electronics or any other subject, trade or vocation in the form of a sales contract or any other agreement which does not contain on the front page of the contract in bold face type of a minimum size of ten (10) points, a statement in the following form:

If You Change Your Mind

After you sign this contract, we will send you a Disclosure Form that will tell you how many of our students graduate and get jobs. At the same time, we will mail you another disclosure form headed "If You Change Your Mind." You should know that if we mail

you this disclosure form this means that we have accepted you as a student. If we don't send you both of these forms in the mail, this contract is automatically cancelled and you don't owe us anything.

If you have changed your mind, you have fourteen days to get out of this contract. The fourteen days start on the day that we mail you the disclosure forms, but you can cancel before then. All you have to do is sign the cancellation notice on the bottom of this page or the disclosure form, put a date on it, and mail it to us by midnight of the fourteenth day after the disclosure form is mailed to you. The disclosure form will tell you when your fourteen days are up.

If you want, you can also send a letter of your own during this fourteen day period that says you want to get out of this contract. Be sure that you sign and date the letter. If possible, keep a copy. Your contract will be cancelled the day you mail us the written notice.

If you decide not to take this course during this fourteen day period, we will send you a full refund of any money that you have paid. Once we know that you have decided not to take the course, we will return your money within two weeks from the day we receive notice of your cancellation.

(b) Failing to place at the bottom of the first page of the enrollment contract the following detachable cancellation notice:

I've changed my mind and am getting out of the contract.

Date (Student's Signature)

(c) Failing to mail to the student, after the school has accepted the enrollment contract, the disclosure of the school's graduation and placement rate, as required by Part I, Paragraph 8 herein, and, on a separate sheet of paper, the following dated notice, as required by Part I, Paragraph 9(a).

If You Change Your Mind

If you have changed your mind, you have fourteen days to get out of this contract. These fourteen days will end at midnight on [14 days from the day notice is mailed]. All you have to do is sign this paper on the bottom, put a date on it, and mail it back to us by this date. Your contract will be cancelled the day you mail this notice back to us.

If you decide not to take this course during this fourteen day period, we will send you a full refund of any money that you have paid. Once we know that you have decided not to take the course we will return your money within two weeks from the time we receive notice of your cancellation.

If you change your mind and want to get out of this contract after you have started the course, you will owe the school some money. See the part of the contract called "Refund In the Event of Termination After You Start the Course" for an explanation of your rights to cancel after the course has started.

I've changed my mind and am getting out of the contract.

Date (Student's signature)

(d) Failing to orally inform each prospective enrollee that he/she has a right to cancel at the time he/she signs a contract or agreement for the sale of any course of instruction.

(e) Misrepresenting in any manner the prospective enrollee's right to cancel.

(f) Failing or refusing to refund all payments made under the contract or sale and cancel and return any negotiable instrument executed by the prospective enrollee in connection with the contract or sale, to the prospective enrollee within fourteen (14) business days after receipt of such notice of cancellation.

10. (a) Contracting for the sale of any course of instruction in the field of accounting, television repair, electronics or any other subject, trade or vocation in the form of a sales contract or any other agreement which does not contain on the front page of the enrollment contract, immediately following the disclosure notice required by Part I, Paragraph 9(a) herein, the following statement:

Refund In the Event of Termination After You Start the Course

If you change your mind after this fourteen day period, you can still drop this course any time. All you have to do is send or give us a letter signed and dated by you that says you want to drop the course.

If possible, you should keep a copy of the letter. The day you send us this letter, you've dropped the course.

If you do drop out, you still will have to pay for the lessons you sent in. We'll figure the amount you owe us like this. The price per lesson is $ ________ . We multiply this by the number of lessons you sent in. We add $ ________ registration fee. The total is what you owe us.

If you've already paid more, we'll refund you the difference within 28 days after we receive the letter.

(b) Receiving, demanding or retaining more than a pro rata portion of the total contract price plus a registration fee in an amount not to exceed $75 in the event a student cancels his course in accordance with the terms of this paragraph, and such pro rata portion will be calculated in the following manner:

(1) the school must calculate the number of lessons received from the student before the student's cancellation;

(2) this number must be divided by the total number of lessons required to complete the course; and

(3) the resulting number shall be multiplied by the total contract price.

(c) Failing to provide the student with the correct refund payment, if any, or to cancel that portion of the student's indebtedness that exceeds the amount due the school, within twenty-one (21) days of the receipt of cancellation pursuant to this paragraph.

(d) Failing to orally inform each prospective enrollee that there is a refund policy in the event the student cancels his course of instruction prior to completion of the course of instruction.

(e) Misrepresenting in any manner the nature of the prospective enrollee's tuition obligation and right to a refund upon cancellation.

11. Misrepresenting, orally, visually, in writing or in any other manner, directly or by implication that respondents' courses are endorsed by the Veteran's Administration, HEW or any Government Agency or Department; or misrepresenting in any manner the extent or nature of any approval or other form of government action taken with respect to any school or course of instruction.

12. In the event the Commission promulgates a final Trade Regulation Rule on Advertising, Disclosure, Cooling-Off and Refund Requirements Concerning Proprietary Vocational and Home Study Schools, then, so long as and to the extent that such Rule shall be in effect, such Trade Regulation Rule shall completely supersede and replace the provisions of this order set forth in Part I, Paragraphs 1(a), 7, 8, 9 and 10, provided that if no provision of the Trade Regulation Rule relates in whole or in part to any matter covered by provisions of one of the aforesaid Paragraphs of this order, then said provisions of said Paragraph shall remain in full force and effect.

II

It is further ordered, That:

1. Respondents deliver a copy of this decision and order to each of its present and future employees, salesmen, agents, solicitors, independent contractors or to any other person or entity who promotes, offers for sale, sells or distributes (hereinafter referred to as "sells") any course of home study instruction included within the scope of this order.

2. Respondents provide each person or entity described in Part II, Paragraph 1 of this order with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said person or entity is so employed and for a period of five (5) years thereafter; and make said statement available to the Commission's staff for inspection and copying upon request.

3. Respondents inform each person or entity described in Part II,

Paragraph 1 of this order that the respondent will not employ or will terminate the employment of any such person or entity in selling such home study courses, unless such party agrees to and does file notice with the respondents that he or she will be bound by the provisions contained in this order.

4. If a person or entity described in Part II, Paragraph 1 of this order will not agree to file with respondents the notice set forth in Part II, Paragraph 2 of this order and be bound by the provisions of the order, respondents shall not employ or continue the employment of, such person or entity to sell any course of instruction covered by this order.

5. Respondents inform the persons or entities described in Part II, Paragraph 1 of this order that respondents are obligated by this order to discontinue dealing with or to terminate the employment in selling their courses of persons or entities who continue on their own the acts or practices prohibited by this order.

6. Respondents discontinue dealing with or terminate the employment in selling the courses of any person or entity described in Part II, Paragraph 1 of this order, who continues on his or her own any act or practice prohibited by this order.

7. Respondents shall forthwith distribute a copy of this order to each of its divisions or subsidiary corporations which is involved in the advertising, promotion or sale of any home study course of instruction included within the scope of this order.

III

It is further ordered, That:

1. Respondents shall not issue any instructions or directions respecting the Escrow Account to the Federal Trade Commission or its designee, or the Escrow Agent in the performance of their duties pursuant to this Agreement and the Escrow Instructions attached hereto as Appendix C and incorporated herein, including but not limited to, investment of the Property held by the Escrow Agent, determination of purchasers pursuant to Part IV of this order and the written directions of the Federal Trade Commission or its designee, or disbursement of the Property by the Escrow Agent. Respondents shall not exercise any control over the property in the Escrow Account.

2. Respondents shall provide the Federal Trade Commission or its designee access on respondents' premises to any student file folders maintained by respondents, provided the Federal Trade Commission has the consent of the students whose files are sought for inspection.

IV

It is further ordered, That:

1. For the purposes of Part IV of this order, the following definitions shall apply:

(a) The term "Purchasers" shall mean those students who paid all or some portion of their own tuition to respondents and who did not have their tuition paid in full or their payments fully reimbursed, by any federal, state or local government agency or department, or any private business organization, other than one that he/she owns;

(b) The term "Relevant Period" shall mean the period commencing May 27, 1974 to the present.

(c) A purchaser shall be deemed to be covered by the relevant period if such purchaser:

(1) enrolled in a Bell & Howell Schools, Inc. electronics or accounting home study course during the relevant period; or

(2) enrolled in a Bell & Howell Schools, Inc. electronics or accounting home study course after January 1, 1971 and made any tuition payment during the relevant period to Bell & Howell Schools, Inc. or to any person or entity on account of any such course.

2. Respondents shall submit to the Chicago Regional Office of the Federal Trade Commission, within thirty (30) days after the date this order is served on respondents, a notarized affidavit executed by a duly authorized officer of respondents, to the effect that respondents have made a good faith search of documents that pertain to purchasers of respondents' accounting, television repair, and electronics courses of instruction, and that respondents, to the best of their knowledge, have previously or simultaneously with said affidavit submitted to the Chicago Regional Office of the Federal Trade Commission the names and most current known addresses of all such purchasers who enrolled in said courses after January 1, 1971.

3. The Federal Trade Commission has determined that purchasers who may be eligible to receive refunds from the Escrow Account are those purchasers who in the relevant period:

(a) (1) Enrolled in the course for the purpose of obtaining employment in their fields of instruction; and

(2) Successfully completed 100% of the lessons in the course; and

(3) Sought employment in their fields of instructions; and

(4) Did not obtain employment in their fields of instruction.

(b) (1) Terminated, or were terminated, from their course of instruction prior to completion of 100% of the lessons because:

(a) They were unable to successfully assimilate the subject matter of the course because they lacked adequate education or background; or

(b) They were unable to successfully assimilate the subject matter of the course because they could not obtain instructional assistance through help sessions, or telephone services, or requests for technical consultation and they indicate that such assistance was necessary to progress through the course; or

(c) They were unable to devote sufficient time to study for the course.

(c) (1) Enrolled in an accounting course with the expectation that they would be qualified by graduation from the course to take the state licensing examination to become a Certified Public Accountant in the state in which the purchasers resided; and

(2) Later determined that they were not thereby qualified to take the state licensing examination to become a Certified Public Accountant in the state in which they resided as of the date of the sales presentation, and

(3) Indicate that they terminated from the course of instruction because, or determined after graduation that, they were not thereby qualified to take the state licensing examination to become a Certified Public Accountant.

(d) (1) Were misled as to the cost of the course of instruction which would have to be borne by the purchasers or as to the refund policy of Bell & Howell Schools, Inc. in the event such purchasers terminated their enrollment in such course; and

(2) Terminated, or were terminated, from the course of instruction prior to completion of 100% of the lessons of the course.

(e) (1) Were terminated from their courses of instruction because the purchasers failed to submit lessons in a timely manner to Bell & Howell Schools, Inc.; and

(2) Indicated that the reason for their delay was that Bell & Howell Schools, Inc. failed to supply equipment or lessons to the purchasers as represented in its advertisements, sales presentation, or enrollment contracts.

(f) (1) Enrolled in the course for the purpose of obtaining employment in their fields of instruction; and

(2) Terminated from the course of instruction because they were informed that such course was not adequate to prepare them for employment in the fields for which such course offered training.

4. The fact that a purchaser is canvassed does not itself mean that such purchaser will receive a refund. The Federal Trade Commission or its designee shall determine which purchasers shall be entitled to a

refund and the amount to be paid such purchasers; *provided, however*, that such refund shall be based upon no more than the amount of the purchaser's tuition obligation not paid or reimbursed by any federal, state or local government agency or department, or any private business organization, other than one that he/she owns. In no event shall any purchaser receive an amount greater than his/her tuition obligation less his/her reimbursement or other payment from the aforementioned agencies, departments or organizations. Such refunds shall be paid out of the Escrow Account established pursuant to Paragraphs 9 through 13 and Part III of this order.

5. No purchasers shall be deemed by respondents to have waived any claim that they may have, or may hereafter have, against respondents, their successors and assigns, arising in any manner whatsoever from enrollment in any of respondents' home study courses prior to January 21, 1976, unless such purchasers accept a refund pursuant to Part IV of this order. Acceptance of a refund pursuant to Part IV of this order will be a bar to assertion of any such claim.

V

It is further ordered, That respondents maintain for a period of ten (10) years, records which shall show the manner and form of respondents' continuing compliance with the above terms and provisions of this order.

VI

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order; *provided, however*, that if respondents do not have thirty (30) days lead time between proposal of such change and its consummation, respondents shall notify the Commission thereof at the earliest feasible time before consummation and any entity which may succeed to any part of the business covered by this order will have been advised of every provision of this order and will have agreed to be bound thereby.

VII

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A

ABC SCHOOL - Drafting Course

Jobs and Earnings Record for students enrolled between January 1, 1974 and January 1976

I. Graduation Record

100 students enrolled.
50 students graduated. That's 50% of the class.
30 students didn't finish the course. That's 30% of the class.*
20 students are still enrolled. That's 20% of the class.

II. Placement Record

36 graduates have told us that they got jobs in drafting within four months of leaving school.** That's 72% of those who graduated.

Here's what they earned:

9 earned $6000–$7999. (18% of all graduates)
11 earned $8000–$9999. (22% of all graduates)
7 earned $10,000–$11,999. (14% of all graduates)
7 earned $12,000–$13,999. (14% of all graduates)
2 refused to tell us what their salary was. (4% of all graduates)

APPENDIX B

The first Base Period shall be the two (2) year period ending three (3) months prior to the effective date of this Order. Subsequent base periods shall be of two (2) year duration commencing on the next day following the termination of the prior base period. Base Periods shall be numbered consecutively beginning with the first base period (i.e. Base Period #1) as defined above.

The three (3) month period immediately following the close of a base period shall be used by respondents to record and compile the information required by Part I, Paragraph 1(a) 8 and Appendix A. In addition, respondents may not include in the computation of students for the base period any person whose enrollment terminated during the three (3) month recordation period. Such persons will be included in the statistics for the subsequent base period.

On the first business day falling more than three (3) months after the termination of the base period, respondents shall begin dissemination of that base period's statistics as required by this Order. Respondents shall continue to distribute said statistics until the first business day falling three (3) months after the termination of the next base period, at which time dissemination of the next set of base period statistics must begin.

---

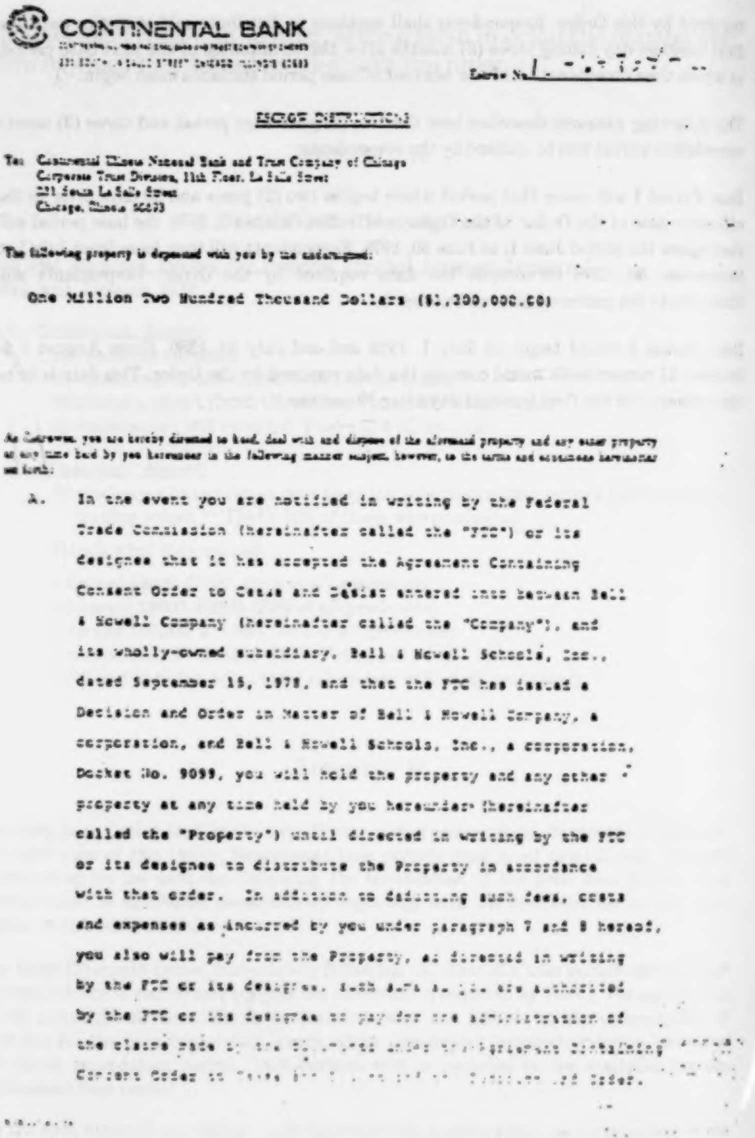
* Students may drop out of a course for any of several reasons, such as dissatisfaction with the course, inability to do the work, or personal reasons.

** [Optional] Some (many) of our students don't take this course to get a job, and we were unable to reach some of our graduates to find out whether they got jobs.

The following example describes how the two (2) year base period and three (3) month recordation period will be utilized by the respondents:

Base Period 1 will cover that period which begins two (2) years and 90 days prior to the effective date of the Order. If the Order is effective October 1, 1978, the base period will encompass the period June 1, to June 30, 1978. Respondents will then have from July 1 to September 30, 1978 to compile the data required by the Order. Respondents will disseminate the gathered data on October 1.

Base Period 2 would begin on July 1, 1978 and end July 30, 1980. From August 1 to October 31 respondents would compile the data required by the Order. This data is to be disseminated on the first business day after November 1.



CONTINENTAL BANK
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO
231 SOUTH LA SALLE STREET CHICAGO ILLINOIS 60693

Escrow No. [illegible]

ESCROW INSTRUCTIONS

To: Continental Illinois National Bank and Trust Company of Chicago
Corporate Trust Division, 11th Floor, La Salle Street
231 South La Salle Street
Chicago, Illinois 60693

The following property is deposited with you by the undersigned:

One Million Two Hundred Thousand Dollars ($1,200,000.00)

As Escrowee, you are hereby directed to hold, deal with and dispose of the aforesaid property and any other property at any time held by you hereunder in the following manner subject, however, to the terms and conditions hereinafter set forth:

A. In the event you are notified in writing by the Federal Trade Commission (hereinafter called the "FTC") or its designee that it has accepted the Agreement Containing Consent Order to Cease and Desist entered into between Bell & Howell Company (hereinafter called the "Company"), and its wholly-owned subsidiary, Bell & Howell Schools, Inc., dated September 15, 1978, and that the FTC has issued a Decision and Order in Matter of Bell & Howell Company, a corporation, and Bell & Howell Schools, Inc., a corporation, Docket No. 9099, you will hold the property and any other property at any time held by you hereunder (hereinafter called the "Property") until directed in writing by the FTC or its designee to distribute the Property in accordance with that order. In addition to deducting such fees, costs and expenses as incurred by you under paragraph 7 and 8 hereof, you also will pay from the Property, as directed in writing by the FTC or its designee, such sums as are authorized by the FTC or its designee to pay for the administration of the claims made by the Consumers under the Agreement Containing Consent Order to Cease and Desist and the Decision and Order.

In addition, you shall execute such contracts regarding administration of the Escrow Account as the FTC or its designee directs. In the event the FTC or its designee does not direct you to disburse all or any of the Property within three and one-half (3 1/2) years of the date hereof, you shall return any of the Property remaining to the Company, less your fees, costs and expenses, within ten days of the end of the three and one-half(3 1/2) year period. Subject to this paragraph and paragraph 10 hereof, this escrow will terminate upon the disbursement of all the Property pursuant to the written direction of the FTC or its designee.

B. In the event the FTC or its designee notifies you that it has determined not to accept the Agreement Containing Consent Order to Cease and Desist and to issue a Decision and Order as provided in Paragraph A, this escrow will terminate and the Property will be returned by you to the Company not later than ten days after receipt of written notice from the FTC or its designee that the Agreement was not accepted.

C. Upon receipt of the Property you will invest the proceeds in either certificates of deposit or obligations of the United States Government or its agencies. You will invest the Property with the aim of securing principal, while maximizing interest income. In the exercise of your sound discretion, if you determine it necessary to sell any or all of the Property prior to maturity and invest the proceeds in either other certificates of deposit or obligations of the United States Government or its agencies, you may do so.

D. Upon maturity of any of the Property you will invest the proceeds in either additional certificates of deposit or obligations of the United States Government or its agencies.

You will invest the proceeds with the aim of securing principal, while maximizing interest income. In the exercise of your sound discretion, if you determine it necessary to sell any or all of the Property prior to maturity and invest the proceeds in either other certificates of deposit or obligations of the United States Government or its agencies, you may do so

E. You will send the Company, the attorneys for the Company, and the FTC or its designee, monthly cash and asset statements of this escrow account.

F. In the event the FTC directs you to make checks payable to individual purchasers of Bell & Howell Schools, Inc. home study courses each check shall bear the following inscription on the back of its face:

> "If you cash, sign or deposit this check, it means that you are giving up forever any legal right you may have to assert any claim against or to sue Bell & Howell Schools, Inc. and Bell & Howell Company, or their successors or assigns, regarding anything that arose due to your enrollment prior to January 21, 1976 in any home study course of Bell & Howell Schools, Inc."

G. These escrow instructions may be amended any time by a document duly executed by the Company and the FTC or its designee entitled "Amendment to Escrow Instructions" to which you acknowledge receipt.

H. If the FTC decides to use a designee, you will not act pursuant to such designee's orders, until you receive a certified copy of the order of the FTC naming such designee.

Terms and Conditions

1. Your duties and responsibilities shall be limited to those expressly set forth in these escrow instructions, and you shall not be subject to, nor obliged to recognize, any other agreement between, or direction or instructions of, any or all of the parties hereto even though reference thereto may be made herein; provided, however, with your written consent, these escrow instructions may be amended at any time or times by an instrument in writing signed by all of the then parties in interest.

2. You are authorized, in your sole discretion, to disregard any and all notices or instructions given by any of the undersigned or by any other person, firm or corporation, except only such notices or instructions as are hereinabove provided for and orders or process of any court entered or issued with or without jurisdiction. If any property subject hereto is at any time attached, garnished, or levied upon under any court order or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then and in any of such events you are authorized, in your sole discretion, to rely upon and comply with any such order, writ, judgment or decree which you are advised by legal counsel of your own choosing is binding upon you; and if you comply with any such order, writ, judgment or decree you shall not be liable to any of the parties hereto or to any other person, firm or corporation by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

3. You shall not be personally liable for any act taken or omitted hereunder if taken or omitted by you in good faith and in the exercise of your own best judgment. You shall also be fully protected in relying upon any written notice, demand, certificate or document which you in good faith believe to be genuine.

4. Unless otherwise specifically indicated herein you shall proceed as soon as practicable to collect any checks or other collection items at any time deposited hereunder. All such collections shall be subject to the usual collection agreements regarding items received by your commercial banking department for deposit or collection. You shall not be required or have a duty to notify anyone of any payment or maturity under the terms of any instrument deposited hereunder, nor to take any legal action to enforce payment of any check, note or security deposited hereunder. You shall have no liability to pay interest on any money deposited or received hereunder.

5. You shall not be responsible for the sufficiency or accuracy of the form, execution, validity or genuineness of documents or securities now or hereafter deposited hereunder, or of any endorsement thereon, or for any lack of endorsement thereon, or for any description therein, nor shall you be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such document, security or endorsement or these escrow instructions.

6. Any notice which you are required or desire to give hereunder to any of the undersigned shall be in writing and may be given by mailing the same to the address indicated below opposite the signature of such undersigned (or to such other address as said undersigned may have theretofore substituted therefor by written notification to you), by United States mail, postage prepaid. For all purposes hereof any notice so mailed shall be as effectual as though served upon the person of the undersigned to whom it was mailed at the time it is deposited in the United States mail by you whether or not such undersigned thereafter actually receives such notice. Notices to you shall be in writing and shall not be deemed to be given until actually received by your trust department employee or officer who administers this escrow. Whenever under the terms hereof the time for giving a notice or performing an act falls upon a Saturday, Sunday, or holiday, such time shall be extended to the next business day.

Page 1

7. If you believe it to be reasonably necessary to consult with counsel concerning any of your duties in connection with this escrow, or in case you become involved in litigation on account of being escrowee hereunder or on account of having received property subject hereto, then in either case, your costs, expenses, and reasonable attorney's fees shall be paid by [illegible]

8. You shall be paid a reasonable fee for your services and reimbursed for your costs and expenses incurred by [illegible] hereto and incorporated herein, and [illegible] A, B, and C.

9. If your fees, costs, expenses or reasonable attorney's fees provided for herein, are not promptly paid, you shall have the right to sell the property held hereunder and reimburse yourself therefor from the proceeds of such sale or from the cash held hereunder.

10. If, by its terms, this escrow shall not have previously terminated, then it shall terminate on April 25 19 82 at which time the property then held hereunder, less your fees, costs and expenses shall be distributed in the following manner:

All the Property then held hereunder, less your fees, costs and expenses, shall be paid by you to the Company no later than April 25, 1982.

11. These escrow instructions shall be construed, enforced, and administered in accordance with the laws of the State of Illinois.

Dated at Chicago, Illinois September 15, 1973

Parties to Escrow	Addresses
Bell & Howell Company	7100 McCormick Road
By	Lincolnwood, Illinois 60645
Its Vice President	
Bell & Howell Schools, Inc.	2201 West Howard Street
By	Evanston, Illinois 60202
Its President	

Receipt

The undersigned Escrowee hereby acknowledges receipt of the property described in the above Escrow Instructions and agrees to hold, deal with and dispose of said property and other property at any time held by it hereunder in accordance with the foregoing Escrow Instructions.

Dated at Chicago, Illinois 9-15-, 1973

Continental Illinois National Bank
and Trust Company of Chicago

ATTEST:

Trust Officer

By

Second Vice President

Executed in ____ Copies

Page [illegible]

CONTINENTAL BANK

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO • 231 SOUTH LA SALLE STREET, CHICAGO, ILLINOIS 60693

[illegible]

SCHEDULE OF FEES FOR OPERATING SERVICES AS ESCROW AGENT

As Escrow Agent, Continental Bank prepares and mails checks to participants or claimants, maintains a record of each participant or claimant, and prepares the necessary IRS tax forms.

Distributions:

For execution by check of payments to participants or claimants.

First 5,000 checks	each $0.30
Next 5,000 checks	each .25
Over 10,000 checks	each .20

Minimum charge:	Number of Checks	Per Distribution
	1-5	$10
	6-49	$25
	50 or Greater	$50

Maintenance of Records for Participants or Claimants:

For opening and maintaining a record for each participant or claimant and posting subsequent changes.

1 - 10 Accounts		$25 minimum
11 - 50 Accounts		$50 minimum
51 - 1,000 Accounts	each $1.25	
Excess over 1,000 Accounts	each $ .75	

Applies Over 50 Accounts:
(minimum annual charges $100)

Preparing and Filing Taxpayer Reports:

For obtaining taxpayer identification numbers, using IRS Form 2435 (postage billed separately)	Each $ .20
For reporting interest paid to holders on IRS Form 1099 (postage billed separately) (minimum annual charge: $10)	Each $ .25

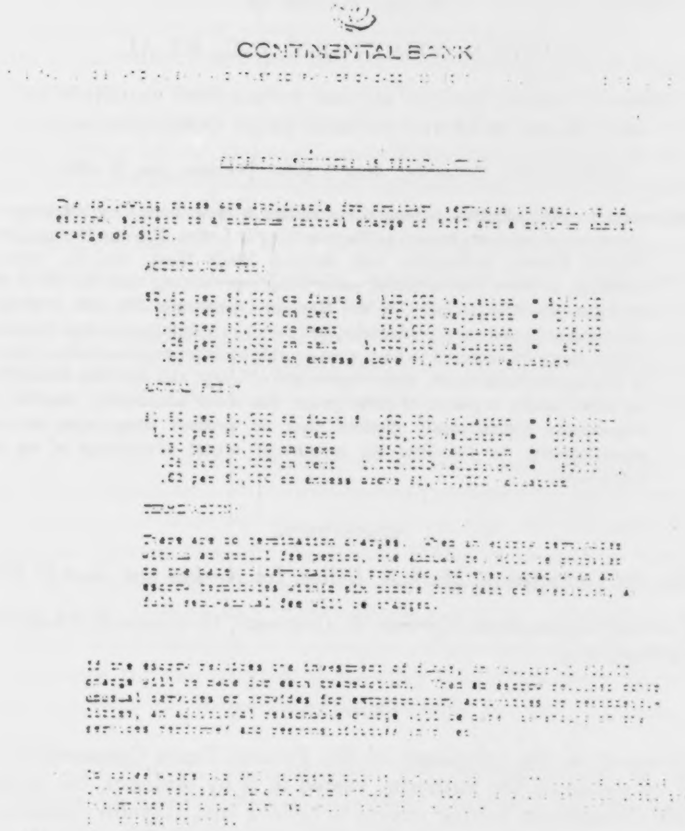
APPENDIX A

Addressing and Enclosing:

For addressing envelopes, per name	$ [illegible]
For enclosing materials, manually, in standard [illegible]	
First Enclosure	$ [illegible]
Additional Enclosures	$ .015
Manual Folding Additional (minimum charge: $25 per mailing)	$ .025

Expenses and Other Charges: The fees quoted in this schedule apply to services ordinarily rendered in administering an Escrow, and are subject to reasonable adjustment where the Agent is called upon to undertake unusual duties or responsibilities, or if changes in laws, procedures, or cost of doing business demand. The cost of all stationery and supplies, telephone, postage, printing, taxes, mail insurance premiums, and other out-of-pocket expenses will be added to our regular service charges. Fees are ordinarily billed annually.

Effective 1-1-77



CONTINENTAL BANK

[illegible]

[illegible]

The following rates are applicable for ordinary services in acting as escrow, subject to a minimum initial charge of $250 and a minimum annual charge of $150.

ACCEPTANCE FEE:

$2.50 per $1,000 on first $ 100,000 valuation = $250.00
1.50 per $1,000 on next 250,000 valuation = 375.00
.50 per $1,000 on next 250,000 valuation = 125.00
.06 per $1,000 on next 1,000,000 valuation = 60.00
.02 per $1,000 on excess above $1,600,000 valuation

ANNUAL FEE:

$1.50 per $1,000 on first $ 100,000 valuation = $150.00
1.00 per $1,000 on next 250,000 valuation = 250.00
.50 per $1,000 on next 250,000 valuation = 125.00
.06 per $1,000 on next 1,000,000 valuation = 60.00
.02 per $1,000 on excess above $1,600,000 valuation

TERMINATION:

There are no termination charges. When an escrow terminates within an annual fee period, the annual fee will be prorated to the date of termination; provided, however, that when an escrow terminates within six months from date of execution, a full semi-annual fee will be charged.

If the escrow requires the investment of funds, an additional $10.00 charge will be made for each transaction. When an escrow requires extra unusual services or provides for extraordinary activities or responsibilities, an additional reasonable charge will be made dependent on the services performed and responsibilities involved.

In cases where [illegible]

IN THE MATTER OF

HAYOUN COSMETIQUE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3019. Complaint, May 9, 1980—Decision, May 9, 1980

This consent order requires, among other things, a New York City marketer and advertiser of products known as Hayoun Miracle Lotion, Hayoun Drying Lotion, Hayoun Lemon Moisturizer and Hayoun Black Mask, and its corporate president, to cease disseminating advertising representing that the use of these products, alone or as part of the Hayoun Cosmetique Kit, will cure acne; eliminate acne scars and pockmarks; and result in a skin free of acne blemishes. Respondents are required to have a reasonable basis for representations relating to product characteristics, performance and efficacy; and maintain substantiating evidence for a period of three years. The order additionally requires that respondents conspicuously disclose that no product cures acne in every advertisement for the first six months of actual advertising of an acne preparation.

Appearances

For the Commission: *Mark A. Heller, Ira Nerken* and *Ross D. Petty.*

For the respondents: *Norman R. Grutman, Grutman & Schafarina,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Hayoun Cosmetique, Inc., (hereafter "Cosmetique") a corporation and Edouard Hayoun, (hereafter "Hayoun") as an individual and corporate officer, at times referred to as respondents, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Cosmetique is a corporation organized existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 212 E. 68 St., New York, New York.

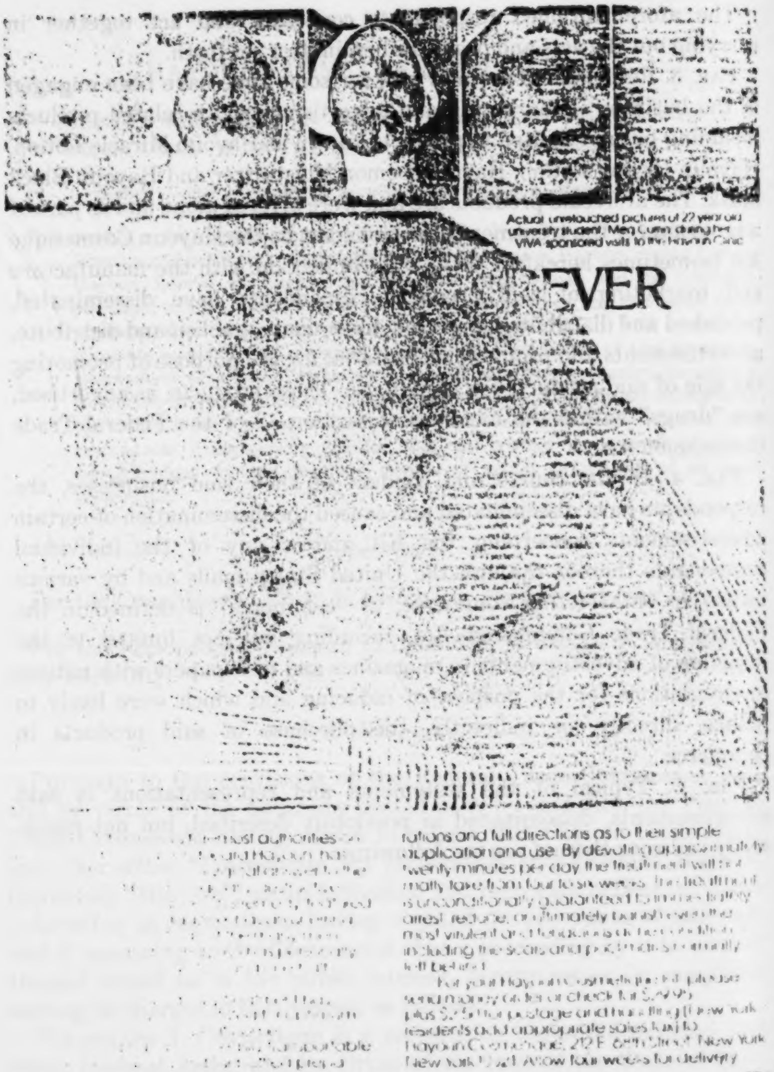
PAR. 2. Hayoun is an individual and corporate president of Cosmetique. He formulates, directs and controls the acts and practices of said corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 3. Respondents are now and for some time have been engaged in the business of marketing and advertising health-related products including but not limited to products known as Hayoun Miracle Lotion, Hayoun Drying Lotion, Hayoun Lemon Moisturizer and Hayoun Black Mask. The aforesaid products are and were offered alone and as part of a program for the treatment of acne known as the Hayoun Cosmetique Kit (sometimes hereafter "Kit"). In connection with the manufacture and marketing of said products, respondents have disseminated, published and distributed, and now disseminate, publish and distribute, advertisements and promotional material for the purpose of promoting the sale of said products for human use. These products, as advertised, are "drugs" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning the Kit and/or any of the individual components thereof through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to the insertion of advertisements in magazines and newspapers with national circulations for the purpose of inducing and which were likely to induce, directly, or indirectly, the purchase of said products in commerce.

PAR. 5. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive thereof are the following:



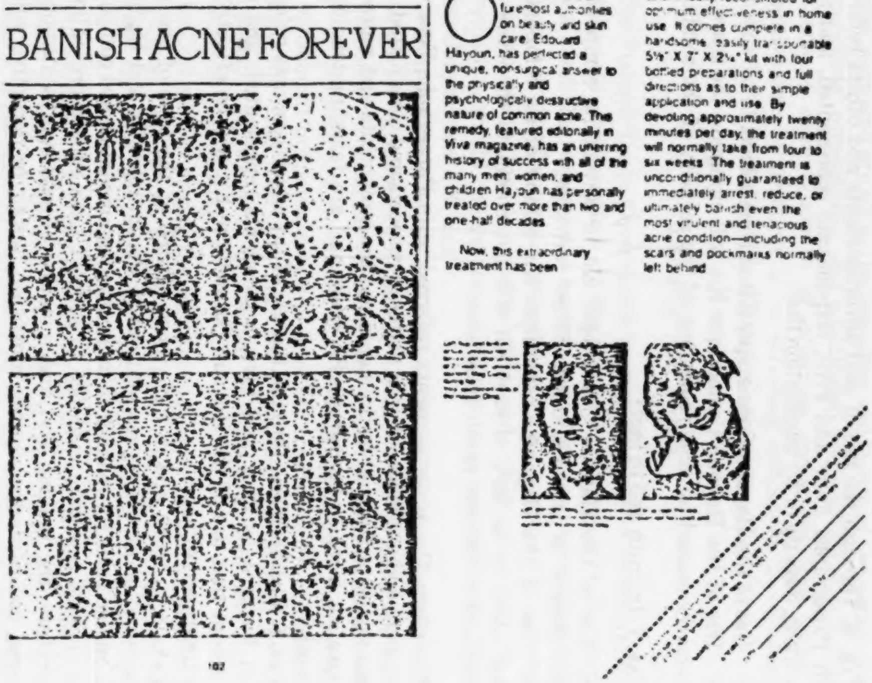
Actual unretouched pictures of 22 year old university student, Meg Cullen during her VIVA sponsored visits to the Hayoun Clinic

[illegible] most authorities [illegible] and Hayoun [illegible] al answer to the [illegible] tolerable [illegible] tion prepa

rations and full directions as to their simple application and use. By devoting approximately twenty minutes per day the treatment will normally take from four to six weeks. The treatment is unconditionally guaranteed to immediately arrest, reduce, or ultimately banish even the most violent and tenacious of facial blemishes including the scars and pock marks normally left behind.

For your Hayoun Cosmetique Kit please send money order or check for [illegible] plus [illegible] for postage and handling (New York residents add appropriate sales tax) to Hayoun Cosmetique, 212 E. [illegible] Street, New York New York [illegible]. Allow four weeks for delivery.

FR 6



BANISH ACNE FOREVER

One of the world's foremost authorities on beauty and skin care, Edouard Hayoun, has perfected a unique, nonsurgical answer to the physically and psychologically destructive nature of common acne. This remedy, featured editorially in Viva magazine, has an unerring history of success with all of the many men, women, and children Hayoun has personally treated over more than two and one-half decades.

Now, this extraordinary treatment has been scientifically reconstituted for optimum effectiveness in home use. It comes complete in a handsome, easily transportable 5½" X 7" X 2¼" kit with four bottled preparations and full directions as to their simple application and use. By devoting approximately twenty minutes per day, the treatment will normally take from four to six weeks. The treatment is unconditionally guaranteed to immediately arrest, reduce, or ultimately banish even the most virulent and tenacious acne condition—including the scars and pockmarks normally left behind.

PAR. 6. Through the use of said advertisements and others referred to in Paragraphs Four and Five, respondents represented, and now represent, directly or by implication that:

a. Use of the Hayoun Cosmetique Kit will cure acne.

b. Use of the Hayoun Cosmetique Kit will eliminate the scars and pockmarks caused by acne regardless of the severity of the condition.

PAR. 7. In truth and in fact:

a. Use of the Hayoun Cosmetique Kit or any of its components either alone or as part of said Kit will not cure acne.

b. Use of the Hayoun Cosmetique Kit or any of its components either alone or as part of said Kit will not eliminate the scars and pockmarks which may result from acne.

Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements and the statements and representations set forth in Paragraph Six were and are false, misleading or deceptive.

PAR. 8. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondents represented, and now represent that use of the Hayoun Cosmetique Kit will be effective in the treatment of acne.

PAR. 9. In truth and in fact, there existed at the time of the first dissemination of the representations in Paragraphs Six and Eight no reasonable basis for making them in that respòndent lacked competent and reliable scientific evidence to support each such representation. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct of their aforesaid business, and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

PAR. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisments, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hayoun Cosmetique, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 212 E. 68 St., New York, New York.

2. Respondent Edouard Hayoun is an individual and corporate officer of Hayoun Cosmetique, Inc., and maintains an office at 212 E. 68 St., New York, New York.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents, Hayoun Cosmetique, Inc., a corporation, its successors and assigns, and its officers, and Edouard Hayoun, individually and as a corporate officer, and the respondents' agents, representatives, and employees, directly or through any corporation, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisements by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of products known as Hayoun Miracle Lotion, Hayoun Drying Lotion, Hayoun Lemon Moisturizer and Hayoun Black Mask either alone or as part of the Hayoun Cosmetique Kit (hereinafter "Kit") or any other acne product or regimen will cure acne or any skin condition associated with acne.

2. Represents use of Kit or any of its components either alone or as part of Kit or any other acne product or regimen will eliminate the scars and/or pockmarks which result from acne or any other associated condition.

B. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. represents that use of the Kit or any of its components or any other product or regimen will result in skin free of pimples, blackheads, whiteheads or other acne blemishes or will be efficacious in the treatment of acne;

2. represents that use of the Kit or any of its components or any other product or regimen will reduce or eliminate scars or pockmarks.

unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two well-controlled double-blind clinical studies which are conducted by different persons, independently of each other. Such persons shall be dermatologists who are qualified by scientific training and experience to treat acne and conduct the aforementioned studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for each such representation(s).

II

It is further ordered, That within sixty (60) days of the acceptance of this order, respondents shall cease and desist from disseminating or causing the dissemination of advertisements for the Kit or any of its components or any other acne product or regimen, unless, during their first six (6) months of actual advertising beginning sixty (60) days after this order becomes final, respondents clearly and conspicuously disclose in every advertisement the corrective message that no product can cure acne. Nothing in any part of each such advertisement shall in any way obscure or contradict the clear meaning of this disclosure. The obligation to run corrective advertisements shall not in any way alleviate other order obligations. Furthermore such advertisements shall not represent, directly or indirectly, that the Federal Trade Commission approves, recommends or in any manner endorses the advertised product or product advertising.

III

It is further ordered, That the corporate respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

It is further ordered, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

IN THE MATTER OF

CADENCE INDUSTRIES CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-1918. Decision, May 13, 1971—Modifying Order, May 12, 1980

This order reopening and modifying an order to cease and desist issued on May 13, 1971, 36 FR 11912, 78 F.T.C. 990, substitutes the name Cadence Industries Corporation for Perfect Film & Chemical Corporation and replaces paragraph 21 of the order with a new paragraph in keeping with orders issued against their competitors and the fact that some magazine publishers do not accept short-term subscriptions transferred from the lists of discontinued publications.

ORDER MODIFYING CEASE AND DESIST ORDER

In their request filed on January 22, 1980, the respondents petitioned the Commission, pursuant to Section 2.51 of its Rules of Practice, to reopen the proceedings and modify the order of May 13, 1971, entered in Docket Number C-1918. Respondents ask that the name Cadence Industries Corporation be substituted for Perfect Film & Chemical Corporation and that numbered paragraph 21 of the order be modified. The paragraph in question reads as follows:

> 21. Substituting, requesting substitution or permitting substitution, except at the request of the customer, at any time during the collection period of the contract, of any magazine or publication for any magazine or publication covered by the contract without first providing the subscriber an option in writing, as stated in the subscription contract, to reduce his future payments by the pro rata portion of the remaining payments due on the cancelled magazine or other publication; provided, that respondents may offer to those subscribers with paid-in-full contracts an option to either lengthen already existing subscriptions or to select from among all of respondents' then currently offered magazines or publications, a magazine or publication as a substitute for the remaining period of the subscription.

In support of their request, respondents state that the name of Perfect Film & Chemical Corporation was duly changed to Cadence Industries Corporation on October 22, 1970, by filing said change with the Secretary of State of Delaware. Respondents have also advanced a number of considerations intended to show changed conditions of fact since the order was issued and to show that the public interest will best be served by granting their request. They allege that they cannot fully comply with paragraph 21 of the order because certain magazine publishers will not accept short term subscriptions transferred from the lists of discontinued publications. They point out that the proviso in paragraph 21 requires that they offer to subscribers with paid-in-full contracts the option to choose any magazine from among all their currently offered magazines or publications, and that, therefore, they are unable to execute a subscriber's choice, if it happens to be a magazine of a publisher that does not accept short term subscriptions. They also point out that no similar proviso is to be found in the orders the Commission has issued against their competitors and they cite that as a competitive disadvantage. Finally, they claim that the requested modification will serve the public interest by enabling them to better serve their subscribers in offering them as possible substitutions, only magazines of publishers that accept short term subscriptions.

Having considered the request, the Commission has concluded that it should be granted and that the modification will safeguard the public interest. Therefore,

It is ordered, That (1) the name Cadence Industries Corporation be substituted for Perfect Film & Chemical Corporation in the style of this docket and throughout the order, where it appears; and that (2) numbered paragraph 21 of the order quoted above, be replaced by the following new paragraph:

> 21. Cancelling a subscription contract for any reason other than a breach by the subscriber without either arranging for the delivery of publications already paid for or promptly refunding money on a pro rata basis for all undelivered issues of publications for which payment has been made in advance; and in the event of the discontinuance of publication, or other unavailability, of any magazines subscribed for, at any time during the life of the contract, failing to offer the subscriber the right to substitute one or more magazines or other publications, or the extension of sùbscription periods of magazines already selected.

It is further ordered, That the foregoing modifications shall become effective upon service of this order.

IN THE MATTER OF

BOC INTERNATIONAL LIMITED

formerly known as

THE BRITISH OXYGEN COMPANY LIMITED, ET AL.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 8955. Complaint, Feb. 26, 1974—Dismissal Order, May 14, 1980*

This order reopens the proceeding and dismisses the complaint issued on February 26, 1974 charging a London, England manufacturer of industrial gases with violating the Federal Trade Commission Act, and Section 7 of the Clayton Act.

ORDER REOPENING PROCEEDING AND DISMISSING COMPLAINT

Upon the joint motion of the parties, this matter was withdrawn from adjudication for settlement purposes by an order of the Commission issued on March 21, 1980. Having considered the proposed settlement reached between the staff of the Commission and the respondents, the Commission determined not to accept the settlement and to dismiss the Complaint. Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the Complaint in Docket No. 8955 be, and it hereby is, dismissed.

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* For order issued in disposition of this proceeding, see 86 F.T.C. 1241.

IN THE MATTER OF

PORTER & DIETSCH, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9047. Decision, Dec. 20, 1977—Modifying Order, May 23, 1980

This order amends a final order issued Dec. 20, 1977, 90 F.T.C. 770, 32 FR 9141, against a St. Paul, Minn. drug distributor by modifying the health risk disclosure requirement to include only those products containing phenylpropanolamine hydrochloride. Previously, the requirement included products containing methylcellulose as well. This modification brings the order into conformance with a Seventh Circuit Court of Appeals decision on review (605 F.2d 294, Aug. 8, 1979).

ORDER AMENDING ORDER TO CEASE AND DESIST

On December 20, 1977, following a complaint and proceeding thereon, the Commission issued its Decision and Order to Cease and Desist against the several named respondents in this matter. The respondents subsequently petitioned the United States Court of Appeals for the Seventh Circuit to review that Decision and Order, and that court issued its decision in the matter on August 8, 1979, requiring modification of the Order in certain respects. *Porter & Dietsch, Inc., et al.* v. *FTC*, 605 F.2d 294, 308–310. Respondents subsequently filed petitions for *certiorari* in the Supreme Court (79–731 and 79–1090), which were denied on March 31, 1980.

Accordingly, we hereby amend our order of December 20, 1977, in the following respects to conform to the mandate of the court of appeals:

First, we strike the existing paragraph I.E. and insert the folowing paragraphs I.E and I.F:

> E. Disseminating or causing to be disseminated by the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement for any such product containing phenylpropanolamine hydrochloride or similar ingredients with similar properties, or methylcellulose (whether or not such products contain other ingredients as well) or any product held out as a diet remedy or other remedy for the reduction of human body weight unless such advertising "clearly and conspicuously" (in print at least as large as the largest print appearing in the advertising, or in an oral presentation, in speech as clear and distinct as that delivered in the rest of the presentation) discloses the following statement, with nothing to the contrary or in mitigation of this statement:
>
> "DIETING IS REQUIRED"
>
> F. Disseminating or causing to be disseminated by United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade

Commission Act, any advertisement for any such product containing phenylpropanolamine hydrochloride or similar ingredients with similar properties and held out as a diet remedy or other remedy for the reduction of human body weight unless such advertising "clearly and conspicuously" (in print at least as large as the largest print appearing in the advertising or, in an oral presentation, in speech as clear and distinct as that delivered in the rest of the presentation) discloses the following statement, with nothing to the contary or in mitigation of this statement:

WARNING: THIS PRODUCT POSES A SERIOUS HEALTH RISK FOR USERS WITH HIGH BLOOD PRESSURE, HEART DISEASE, DIABETES, OR THYROID DISEASE. READ THE LABEL CAREFULLY BEFORE USING.

Second, we strike the existing paragraph II and insert the following paragraphs II and III (renumbering existing paragraph III and subsequent paragraphs accordingly):

II

It is further ordered, That respondents Kelly Ketting Furth, Inc., a corporation, its successors and assigns, and its officers, and Joseph Furth, individually and as an officer of said corporation; and employees of the foregoing respondents, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of any "food," "drug," "cosmetic," or "device" (as these terms are defined in the Federal Trade Commission Act) held out as a diet remedy or other remedy for the reduction of human body weight, shall forthwith cease and desist from disseminating or causing to be disseminated by United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains a representation or testimonial for such product prohibited by Paragraph I of this order, or which omits a dislosure for such product required by Paragraph I of this order.

III

It is further ordered, That respondent Pay'n Save Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising of any "food," "drug," "cosmetic," or "device" (as these terms are defined in the Federal Trade Commission Act) manufactured or distributed by Porter & Dietsch, Inc., and held out as a diet remedy or other remedy for the reduction of human body weight, shall forthwith cease and desist from disseminating or causing to be disseminated by United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains a representation or testimonial for such product prohibited by Paragraph I of this order, or which omits a disclosure for such product required by Paragraph I of this order.

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9088. Complaint, Aug. 11, 1976—Dismissal Order, June 9, 1980

This order affirms the initial decision of the administrative law judge and grants complaint counsel's motion for dismissal of a complaint alleging that a North Miami Beach, Fla. realtor illegally required buyers of its Florida condominiums to enter into long-term leases of recreation facilities.

Appearances

For the Commission: *Richard C. Donohue* and *David A. Eisenstein.*

For the respondents: *Gerald F. Richman, Frates, Floyd, Pearson, Stewart, Richman & Greer,* Miami, Fla. and *Warren L. Miller, Stein, Halpert & Miller,* Washington, D.C. for respondents Century 21 Commodore Plaza, Inc. and Norman Cohen. *Jerome S. Richman,* Miami, Fla. for respondent Saul Morgan.

COMPLAINT

The Federal Trade Commission, having reason to believe that Century 21 Commodore Plaza, Inc. and Norman Cohen and Saul J. Morgan have violated the provisions of the Federal Trade Commission Act, and that a proceeding with respect to such violations would be in the public interest, hereby issues its complaint, setting forth its charges as follows:

Parties

1. Respondent Century 21 Commodore Plaza, Inc. is a Florida Corporation doing business at 18321 Biscayne Blvd., North Miami Beach, Florida.

2. The Corporate Respondent is the developer of certain real property in Dade County, Florida upon which is situated the condominium development known as Century 21 Commodore Plaza. Century 21 Commodore Plaza comprises 654 residential apartment units. In 1970, respondent filed a Declaration of Condominium submitting the property to condominium ownership and By-laws governing the operation of Commodore Plaza at Century 21 Condominium Association, Inc. (the Association) to be composed of condominium owners who would subsequently purchase units from the corporate respondent.

3. Respondent Norman Cohen is and at relevant times in the past has been an officer and shareholder of the corporate respondent, and has formulated, directed, and controlled the acts and practices of the corporate respondent, including those hereinafter set forth. Respondent Cohen is a trustee and lessor of the recreation lease under which the corporate respondent's buyers are obligated. Respondent Cohen has been at relevant times in the past an officer of the Association. Respondent Cohen is or has been an officer of Morgan's Bay Management Corporation, Inc. (the Management Company) which company is the manager named in the management agreement which the corporate respondent's buyers are required to execute.

4. Respondent Saul J. Morgan has been at relevant times in the past an officer and shareholder of the corporate respondent, and has formulated, directed, and controlled the acts and practices of the corporate respondent, including those hereinafter set forth. Respondent Morgan is or has been a trustee and lessor of the recreation lease under which the corporate respondent's buyers are obligated. Respondent Morgan has been an officer of the Association. Respondent Morgan has been an officer of the Management Company.

5. The Association is a corporation not for profit incorporated under the laws of the state of Florida on December 16, 1970 for the purpose of operating the then to be created condominium known as Commodore Plaza at Century 21. For approximately one year from that date, the Association was under the control of a three member board of directors composed of respondent Norman Cohen, respondent Saul J. Morgan, and David Morgan, a shareholder in the corporate respondent and the brother of respondent Saul J. Morgan. During the time that the Association was under the control of the respondents, the Association executed a long term recreation lease with the individual respondents and a management agreement with the Management Company to which subsequent buyers were bound.

Jurisdiction

6. Respondents are, or at relevant times in the past have been, in the business of selling or offering for sale condominium apartment units for residential purposes to the general public. Respondents have also, through various wholly or partially-owned subsidiaries, been engaged in the construction, management and servicing of the condominium units and of the related common areas, in the leasing of recreation facilities and in the providing of other services related to the above.

7. In the course and conduct of the aforesaid, respondents cause

and have caused their promotional materials, contracts, and various business papers to be transmitted through the U.S. mails and other interstate instrumentalities from their place of business in Florida to customers and prospective customers in various other States and Territories of the United States. Respondents have held promotional parties in Boston, Massachusetts, and New York, New York, and have otherwise contacted persons residing in those areas in order to obtain buyers for respondents' condominium units.

8. Respondents thus maintain and at all times mentioned herein have maintained a substantial course of trade in condominium units and related facilities in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

VIOLATIONS

9. To purchase one of respondents' condominium units, a purchaser must:

(a) acquire an individual fee simple interest in a particular apartment unit;

(b) acquire a fee simple interest in common with owners of other units in certain common areas of the structure and in underlying and surrounding land;

(c) ratify a long-term lease of certain actual or proposed recreational facilities, entered into on the buyer's behalf by the respondent, and the rent for which is subject to increase based on an escalator clause tied to the Food Index of the Consumer Price Index;

(d) execute an agreement pledging the purchaser's ownership interests as security for payment of rent under the aforementioned lease; and

(e) ratify a management agreement entered into on the buyer's behalf by the respondent.

10. Consummation of the purchase of one of respondents' condominium units requires execution or ratification of approximately eight separate documents containing over 100 pages. The documents are prepared by respondents, and most or all of them contain technical legal language and are difficult for a layman or a lawyer not expert in condominium law to interpret.

11. The condominium form of ownership is a recent innovation in the law of real property in the United States and in the State of Florida. The obligations attendant thereto and the documents described in paragraphs 9 and 10, above, are not associated with other types of real property transactions.

12. A substantial number of purchasers of respondents' condominium units were and are persons: (1) having no previous experience with condominiums; (2) not residents of the State of Florida; and/or (3) who have retired and who, as a consequence of their retirement status, do not expect substantial increases in their incomes.

13. The facts set forth in paragraphs 9, 10, 11, and 12, above, were known or should have been known to respondents.

I

14. In print advertising and elsewhere, respondents, directly or by implication, make and have made numerous representations to prospective purchasers with respect to the facilities and services associated with the purchase of respondents' condominium units, including but not limited to representations that:

a. The water of Morgan Bay was safe and healthy for swimming at the time that such representations were made.

b. A golf course was planned for the immediate future.

c. Other facilities and services including but not limited to a shopping plaza; a medical center; a chapel; tram service and other transportation; bowling lanes; a restaurant; and adequate protective security were planned for the immediate future.

d. Other facilities and services promised and provided would be owned in common by the unit owners as a part of their condominium purchase, or would be leased to the unit owners at a fixed monthly rate, and would not entail expense beyond that rate to unit owners.

15. In truth and in fact:

a. Respondents knew or had reason to know that Morgan Bay was not safe and healthy for swimming.

b. A golf course was never built.

c. The facilities and services set forth in paragraph 14(c), above, were never provided.

d. Some other services and facilities promised were never provided; those provided have entailed substantial additional expense to unit owners.

The representations made by respondents as alleged in paragraph 14, above, are unfair and deceptive within the meaning of Section Five of the Federal Trade Commission Act.

16. In print advertising and elsewhere, respondents made statements and representations, directly or by implication, concerning the present and future economic value of respondents' condominium units,

including representations concerning the facilities and services to be provided, the marketability of the units, the present value of the units, and the costs and charges associated with ownership of the units.

17. In making the statements and representations alleged in paragraph 16, above, respondents failed to disclose material facts concerning the effect of the documents described in paragraphs 9 and 10, above, on the present and future value and marketability of the condominium units, and the costs and charges associated with ownership of one of the units, including but not limited to the facts that said documents provided that:

a. Respondents had no express contractual obligation which required them to provide the facilities described in paragraph 14, above, on the terms and conditions represented.

b. Buyers are required through the Association to pay rent under the recreation lease for a period of 99 years.

c. The amount buyers will be required to pay over the term of the lease will be substantially higher than the amount originally imposed by the rent obligation as a result of the Cost of Living Adjustment to Rental also provided for in the lease. The adjustment provision states that the amount of rent due under the lease will be increased annually in accordance with increases in the Food Index of the Consumer Price Index, but that once increased, the rent shall not decrease over the term of the lease.

d. In addition to the rent provided for under the lease agreement, buyers are required to assume all costs associated with the maintenance of the recreation facilities, including but not limited to all costs of taxes, insurance, utilities, and repair and replacement of facilities. As a result of the said requirement, respondents' buyers must pay substantial amounts over and above the rent provided for in the recreation lease toward the maintenance of the leased facilities.

e. Buyers are required to return the leased facilities to the developer at the end of the 99 year lease term in as good a condition as the facilities were received at the beginning of the lease term.

f. The base rent and the adjustments thereto provided for under the recreation lease will require respondents' buyers to pay an amount in excess of the purchase price of their units over the term of the lease.

g. The recreation lease requires the buyers to pay the respondents' attorneys' fees and other costs including the amount of any judgment associated with any attempt on the part of the buyers or any other person to invalidate or modify any aspect of the lease, to make any claim against respondents' interest in the lease, or to enforce the respondents' obligations as lessor under the lease.

h. The terms of the Pledge Agreement require the unit owner to subject all of his right, title, and interest in his condominium unit and the common element appurtenant thereto to a lien held by the developer. The effect of the said Pledge Agreement is to permit respondents to threaten and to effect foreclosure against a unit owner's home in the event of any default in payment due under the lease agreement.

i. The management agreement provides that the Management Company's fee for its services shall be 5% of the amount of the costs assessed against the Association without regard to the actual value of the services provided by the Management Company in connection with such assessments. The management agreement provides that the Management Company may incur many of the costs to be assessed against the Association in the Management Company's sole discretion. The said provision described provides the Management Company with no incentive to preserve the assets of the Association since the greater the costs assessed against the Association, the higher is the Management Company's fee.

j. The management contract provides that money collected from the Association shall be applied by the Management Company in the following order: to the payment of insurance premiums; to the payment of the Management Company's fee, determined as described in i., above; to the payment of rent and other obligations under the recreation lease, as described in b.–f., above; and to the payment of utilities and other costs.

k. The effect of the provision described in j., above, is to compel the Association to pay the rent provided for under the recreation lease and to pay the fee to the Management Company before the Association may pay its costs for utilities and other necessary expenses.

l. The management agreement provides that the agreement between the Management Company and the Association continue for a minimum period of 15 years, and be renewable for successive ten year periods thereafter.

m. The unit owners ratified actions taken by respondents in their capacity as officers and directors of the unit owners association.

n. The unit owners undertook other duties and obligations not known to them.

Said failure to disclose material facts is unfair and deceptive within the meaning of Section Five of the Federal Trade Commission Act.

18. The use by respondents of the aforesaid false, misleading, and deceptive statements and representations and the failure by respondents to disclose material facts have had the tendency and capacity to

mislead members of the purchasing public into erroneous and mistaken beliefs concerning respondents' condominium units and to induce the purchase of respondents' comdominium units and to induce the execution of the pledge agreement and of the documents binding purchasers to the recreation lease and management agreement by reason of said erroneous and mistaken beliefs, and constitute unfair and deceptive acts or practices within the meaning of Section Five of the Federal Trade Commission Act.

II

19. In the course of the condominium sale transaction as described in paragraphs 9–18 above, buyers of respondents' condominium units executed the documents described in paragraph nine. Under the circumstances of the said transaction:

a. The imposition or enforcement of the requirement that charges be assessed against the unit owners under the provisions of the recreation lease described in 17b. to 17f., above, is an unfair act or practice.

b. The imposition or enforcement of the requirement that the unit owners pay respondents' costs of litigation, as described in 17g., above, deters the raising of valid claims and defenses, and imposes unreasonable costs on the unit owners, and is an unfair act or practice.

c. The taking or enforcement of a security interest in the unit owners' homes under the provisions of the pledge agreement described in 17h., above, is an unfair act or practice.

d. The imposition or enforcement of the provisions of the management agreement described in 17j., above, is an unfair act or practice.

e. The imposition or enforcement of the requirement under the management agreement that the Association pay the costs imposed on it by respondents described in 17j. to 17k., above, before it may pay its necessary expenses is unfair to the Association and to the individual unit owners.

f. The term of the management agreement as described in 17l., above, denied the Association the right to cancel or amend for at least 15 years an agreement the provisions of which impose excessive and unfairly determined costs on the unit owners who make up the Association and the imposition or enforcement of said term is an unfair act or practice.

III

20. Respondents' continued enforcement of or attempt to enforce

the Recreation Lease, the Pledge Agreement, and the Management Agreement, or any of these, executed under the circumstances described herein and containing the terms and conditions described herein constitutes an unfair act or practice.

IV

21. The aforementioned acts and practices, as herein alleged, both separately and in the aggregate, were and are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section Five of the Federal Trade Commission Act.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

FEBRUARY 7, 1980

A. FINDINGS OF FACT

1. Respondent Century 21 Commodore Plaza, Inc. is a Florida Corporation doing business at 18321 Biscayne Blvd., North Miami Beach, Florida.

2. The Corporate Respondent is the developer of certain real property in Dade County, Florida upon which is situated the condominium development known as Century 21 Commodore Plaza.

3. Respondent Norman Cohen is and at relevant times in the past has been an officer and shareholder of the corporate respondent and was a trustee and lessor of the recreation lease under which the corporate respondent's buyers were obligated.

4. Respondent Saul J. Morgan was an officer and shareholder of the corporate respondent, and was a trustee and lessor of the recreation lease under which the corporate respondent's buyers were obligated.

5. On April 10, 1979, on motion by complaint counsel, I amended the complaint in this case, with the result that the only issue remaining is whether the use by Mr. Cohen of the long term recreation lease is per se unfair or deceptive. Complaint counsel have now filed a motion asking me to dismiss the amended complaint.

B. CONCLUSIONS OF LAW

Complaint counsel recommend dismissal because changes made—after this complaint issued—in the applicable law by statute, regulation and the courts make it unlikely that the problems addressed in this case will occur in the furture (p. 2 of their motion). I agree. Furthermore, the unit owners at Commodore Plaza who were affected by the recreation lease have purchased it from Mr. Cohen. In my opinion, these developments remove any need for a decision on the merits in this case, and further proceedings would not be in the public interest.

C. ORDER

It is ordered, That the complaint be, and it hereby is, dismissed as to all respondents.

ORDER AFFIRMING THE INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE GRANTING COMPLAINT COUNSEL'S MOTION FOR DISMISSAL

The administrative law judge in the above-captioned case issued an Initial Decision on February 7, 1980 dismissing those portions of the original complaint charging that enforcement of allegedly unfair provisions of a condominium lease agreement violated Section 5 of the Federal Trade Commission Act. The ALJ recommends dismissal because of changes in Florida condominium law, the state of location of the property, and because respondents have signed a settlement agreement with the condominium association.

After considering the record before us, the Commission has determined to affirm the dismissal of this complaint. However, we reverse the ALJ's decision to amend the complaint by deleting certain allegations under Rule 3.15 of the Commission's Rules of Practice and emphasize that only the Commission has authority to eliminate complaint allegations under the circumstances presented here.

Our original complaint issued in August of 1976 charged not only that enforcement by respondents of the lease provisions constituted an unfair practice under Section 5, but also that respondents had deceptively misrepresented the attributes of the condominium arrangement and its leased facilities. In February 1978, we denied a motion by complaint counsel to dismiss or stay the entire complaint. That motion was based upon the changes in Florida law and pending litigation in that state involving operation of the lease provisions. One of the main reasons we denied the dismissal request was because the complaint's misrepresentation charges would not be resolved by either the changes in Florida law or the pending litigation.

On April 10, 1979, the ALJ, upon motion of complaint counsel, deleted the charges in the complaint pertaining to the advertising misrepresentations and several, but not all, of the charges pertaining to the failure to disclose material facts. The misrepresentation charges that remained dealt with respondents' failure to disclose to purchasers the existence and operation of the same provisions which formed the basis of charges concerning enforcement of the lease. The ALJ, without certifying the motion to the Commission, stated that the deletions were justified whether treated as an amendment to the complaint under Section 3.15 of the Rules of Practice, or a dismissal of charges under Section 3.22 of our Rules.

The ALJ's failure to seek Commission approval of the deletion of these charges was in error whether viewed as a dismissal or an amendment.

Under Section 3.15, an ALJ has a limited power to amend without seeking Commission approval. This power extends *only* to matters that facilitate the determination of the merits of a controversy, and has been held to apply to changes that merely clarify the details of existing charges. *Capitol Record Distributing Corp.*, 58 F.T.C. 1170 (1961). ". . . (T)he Commission reserves to itself the discretionary determination of when there is reason to believe the law has been violated and when the public interest requires the institution of proceedings, as well as the authority to frame charges. . . ." *Id.* at 1173. The implementation of any amendment that substantively changes prior Commission action has not been delegated to the ALJ and must be certified to the Commission for approval. *Id.* at 1174.

The limitations on the authority of an ALJ apply with equal force whether the proposed alteration will add to or delete from charges in the complaint. In *Crush International Limited, et al.*, 80 F.T.C. 1023 (1972), the Commission discussed an ALJ's authority to allow an amendment proposing deletion of certain parties from the complaint. We stated that the ALJ had no authority to amend "except to the extent that his ruling deals with matters of procedure rather than substance, such as deletion of an individual respondent who has deceased or the substitution of respondents improperly named. . . ." *Id.* at 1024. Conversely, it follows that if a party were to be deleted for other than these merely technical reasons, such as for example to focus the litigation on a more blatant offender, the amendment is inherently substantive; it would go to the heart of the Commission's initial discretionary determination of violation and must be certified to the Commission for approval.

Similarly, the deletion of the charges in the instant case cannot be considered a procedural technicality. Under no circumstances can a deletion of charges be said to facilitate a determination of the merits because the merits of the deleted charges will never be reached. In addition, the deletion substantively changes both the Commission's prior actions in initially issuing the complaint and its denial of complaint counsel's first motion to dismiss, which was based in part on the failure of Florida law to resolve the misrepresentation issues.

The same result obtains if this procedure is considered as a dismissal. The same boundaries between procedural and substantive actions limit an ALJ's authority in this regard. *Crush International, supra.* If a dismissal is based on a determination that the public interest is no longer affected—a proposition that was explicitly stated by the ALJ in the instant case—the action must be certified for Commission approval.

This decision should not be read to affect any of an ALJ's independent powers under the Rules of Practice. Under Section 3.15, an ALJ may consolidate similar charges of a Commission complaint in order that trial of issues will be easier for the parties or follow a more logical litigation pattern. Such a situation falls comfortably within an ALJ's power under Section 3.15 to alter a complaint "to facilitate a determination of the merits." The instant case, however, involved a wholesale deletion of substantive charges; an action which mandates certification to the Commission. In addition, our clarification of the Rules in no way affects an ALJ's power to dismiss without certification if complaint counsel have not met their burden of proof on an issue or the power to grant summary decision under Section 3.24. Considering the ALJ's action in light of complaint counsel's motion, however, it is apparent that these powers were not presented as a basis for the ALJ's independent action of deleting the misrepresentation charges.

Despite the error that has been committed, we have decided that it does not justify sending this matter back for further litigation on the deleted charges. A review of the record indicates that dismissal of these charges was warranted, although the procedure followed was incorrect. However, after a review of the record, we are in agreement with the ALJ's decision to dismiss and, therefore, the error was harmless.

The changes resulting from the new Florida laws dealing with the conscionability of recreation leases and the settlement agreement alleviate many of the concerns expressed in our original complaint. The Florida law establishes a presumption against the conscionability of recreation leases that contain nine specific provisions, all of which are present in the instant case. Fla. Stat. Sec. 718.122. This law should protect Florida consumers in the future from many of the flagrant abuses associated with recreational leases.

The changes in Florida law, however, do not go as far as a potential Commission order could have under Section 5. Under the Florida condominium law, all of the nine provisions must be present in order to trigger the presumption. Arguably, a lessor could include seven of the nine provisions contained in the law, and avoid operation of the presumption. In addition, while Florida law requires an aggregate of provisions, the Commission's initial complaint charged that the inclusion of particular provisions alone may constitute an unfair act. Finally, the Florida courts have held that the new laws cannot be applied retroactively. Thus, lease agreements consummated prior to the adoption of the Florida legislation will be judged under the less stringent common law standards.

Although these differences between Florida law and possible applications for Section 5 underscore important long run considerations for protection of the consumer and may merit future Commission investigation, a review of the present posture of the instant adjudication convinces us that this case is not the appropriate vehicle for the establishment of Commission precedent.

Respondents and the condominium association have negotiated a settlement whereby the latter have purchased the lease. Part of that agreement prohibits the association from benefitting from FTC action. Any attempt to fashion consumer redress under Section 19 would therefore be difficult and may interfere with or jeopardize the benefits the condominium association has obtained under the settlement.

Similar considerations militate against a potential cease and desist order against respondents. The association now owns the lease and is in a position to cure any injury that may have resulted from respondents' allegedly unfair practices. Since the practices that would be the basis of such an order are no longer within the control of respondents, an order could arguably verge on being frivolous. Although a cease and desist order could be fashioned to prohibit respondents from engaging in similar practices in other lease arrangements, we have no evidence that respondents have such lease arrangements or that consumers are being adversely affected by any practices by respondents. Such an order would go beyond the scope of the adjudication before us. Thus, we are unable to determine if such an order is necessary to preserve the public interest.

Finally, the new Florida laws may act as a substantial deterrent to the practices that we expressed concern about in our complaint. Because the laws are relatively new, we have no way of determining whether their operation will be an effective means of consumer protection or whether consumers are still being injured despite the existence of the laws. Out of deference to state actions and because it is impossible, at this point, to gauge the public interest, we feel that the prudent course is to stay Commission action for the present.

We have also determined that continued litigation over the misrepresentation charges would not, at this point, result in a long range benefit to the public interest. Many of the misrepresentation charges were included in the complaint to illustrate the context in which unfair or deceptive practices may have occurred with respect to the lease agreement. Further, the new Florida law contains provisions requiring pre-disclosure of material facts concerning condominium sales and concerning advertising the availability of facilities not as yet completed. Fla. Stat. Sec. 718.501. Thus, the law prospectively deters the same abuses that a potential Commission cease and desist order could cover.

Considering all of the circumstances that have changed the status of this litigation since the issuance of the complaint, we agree with the ALJ that, on balance, the case should no longer be pursued. Accordingly,

It is ordered, That the Initial Decision granting dismissal be affirmed.

IN THE MATTER OF

TIME INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-1919. Decision, May 13, 1971—Modifying Order, June 9, 1980

This order reopens proceeding and modifies a consent order issued on May 13, 1971, 78 F.T.C. 1004, 36 FR 11916, against a major New York City magazine publisher and its wholly-owned subsidiary, Family Publications Services, Inc., by adding to subparagraph (g) of the *"It is further ordered"* paragraph of the order a modification which deals with the matter of confidential treatment of the material terms of any contract between Time Incorporated and the "paid-during-service" companies.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Time Incorporated (Time Inc.) filed a request that the proceeding be reopened pursuant to Rule 2.51 of the Commission's Rules of Practice on October 17, 1979. In its request, Time Inc. stated that prior to the issuance of the consent order, Time Inc. had been engaged through its wholly-owned subsidiary, Family Publications Service, Inc. (Family) in door-to-door and telephone sales of magazine subscriptions to the public at a fixed contract price paid in monthly installments for a term of years [This sale method is still in use and is referred to in the industry as the "Paid-During-Service" (PDS) plan]; and that three months prior to issuance of the order, Family ceased PDS sales, and Time Inc. has not directly engaged in PDS sales since that time.

Time Inc. also stated that it is at a competitive disadvantage vis-a-vis other magazine publishers, because it had been unable to use the service of independent PDS companies due to the order which requires that the sale and collection practices of any company retained by Time Inc. to sell its magazines under a PDS plan, must conform to the provisions of the order, and that Time Inc. must discontinue dealing with those companies whose practices violate the order and must institute a monitoring program adequate to reveal whether the retained companies are complying with the requirements of the order.

Time Inc. requested that it be relieved from these requirements of the order because all the PDS companies have refused to sell its magazines and to be bound by the order.

The Commission informed Time Inc. by letter dated December 19, 1979 that it had determined to deny the October 17, 1979 request, but that it was willing to reopen the proceeding and modify the order as set forth in that letter. Time Inc. filed another request to reopen on March 20, 1980, accepting the modification proposed by the Commission with a suggested addition to paragraph (1)(a), which addition deals with the matter of confidential treatment of the material terms of any contract between Time Inc. and the PDS companies. By letter dated April 7, 1980, Time Inc. informed staff that it accepts the substitute addition to paragraph (1)(a) herein, as proposed by the Commission's counsel. Thereafter the Commission issued an order to show cause why the proceeding should not be reopened and the order should not be modified.

Time Inc. has not filed an answer to the order to show cause within thirty days after date of service of that order, and it has, thus, consented to the proposed modification. The Commission has determined that it is in the public interest to reopen the proceeding and to modify the final order in Docket C-1919.

Therefore, it is ordered, That the proceeding is hereby reopened and the Decision and Order issued on May 13, 1971, is hereby modified by adding the following language after subparagraph (g) of the *It is further ordered* paragraph of the order:

> *Provided, however*, That the provisions of this order shall not be applicable to Time Inc. if Time Inc. can establish that Time Inc. (either directly or through any subsidiary or other entity in which the Company shall have a substantial financial or stock interest or over which it shall exercise control) is not engaged in the business of advertising, selling, offering for sale or the distribution of magazines by subscriptions to purchase any such magazines through a "paid-during-service" plan[1] ("PDS") or through a "cash sale" plan (as "cash sale" is defined in the order in C-1919), and provided that:
>
> (1) In the event Time Inc. or any of its Subsidiaries and/or Affiliates shall authorize any third party to offer for sale any subscription to a Time Inc. publication through a "PDS" type plan or through a "cash sale" plan:
>
> (a) Time Inc. shall promptly furnish the Federal Trade Commission with the name and address of such third party together with a copy of the contract when executed, provided that Time Inc. may request that the material terms of such contract be accorded confidential treatment in accordance with Section 4.10 of the Commission's Rules of Practice, 16 CFR 4.10; and
>
> (b) the agreement with such third party will provide that the third party must disclose, in writing, to its customer the cost of each publication sold and the terms and conditions of payment for same and provide the customer in a clear and conspicuous manner a three business day right of cancellation or a right to cancel the subscription order at any time after receipt of the written disclosure; and
>
> (c) if Time Inc. obtains information that the third party is not furnishing the customer with the written disclosures and/or not providing the three day right of cancellation, Time Inc. shall remind the third party of its obligations under the agreement and if the third party refuses to abide by the agreement Time Inc. shall cancel the agreement.
>
> (d) Time Inc. shall preserve, for a period of three years after receipt, each complaint

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[1] This would include any paid-during-service business obtained through door-to-door or telephone solicitation.

received by Time Inc. about the sale of a subscription to a Time Inc. magazine sold through a "PDS" plan or "cash sale" plan, and shall make them available during such period to the Federal Trade Commission at its request, together with the identity of the "PDS" agency which sold such subscription; and

(e) Time Inc. will, upon notice of any customer's request, made either to the third party seller or to Time Inc., cancel any subscription to a Time Inc. publication and provide a pro-rata refund of the subscription price of the publication(s) to the customer when the request for cancellation alleges or indicates that the seller engaged in any practices prohibited by the order in Docket C-1919.

(2) In the event Time Inc. or any of its Subsidiaries and/or Affiliates or any other entity in which the Company shall have a substantial financial or stock interest or over which it shall exercise control shall engage in "PDS" business or "cash sale" business it shall give the Federal Trade Commission at least sixty days prior notice of its intention to engage in such business.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

SEARS, ROEBUCK AND CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9104. Decision, April 28, 1980—Modifying Order, June 10, 1980

This order modifies a previous order to cease and desist issued April 28, 1980, 95 F.T.C. 414, 45 FR 36372, against a Chicago, Ill. department store chain, by adding the terms "dehumidifiers" and "freezers" to the definition of "major home appliances" contained in order Paragraph I(1).

ORDER CORRECTING INADVERTENT OMISSION FROM FINAL ORDER

By motion filed May 21, 1980, complaint counsel have requested that the Commission modify its final order in this matter to add the terms "dehumidifiers" and "freezers" to the definition of "major home appliances" contained in the order.

Complaint counsel are correct in their suggestion that the omission of these two terms from the order was inadvertent. At page 18 of the Commission's decision it indicated its desire to adopt the definition proposed by Judge Hanscom, with the omission of the catch-all provision ("and any other product that falls into the category of major home appliances") and with the addition of the terms "stoves" and "ovens". The final order appended to the decision omits mention of dehumidifiers and freezers, even though these were contained in Judge Hanscom's order as recited on page 17 of the Commission's decision. To correct this inadvertent omission, the final order will be modified. Therefore,

It is ordered, That Paragraph I(1) of the Final Order in this matter be modified to read:

"Major home appliance" means air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, freezers, ranges, stoves, ovens (including microwave ovens), humidifiers, and dehumidifiers.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9074. Complaint, Feb. 10, 1976—Decision, June 11, 1980

This consent order requires, among other things, a Detroit, Mich. motor vehicle manufacturer (GM) to change its official accounting procedures for dealers, to include specified procedures for determining surpluses realized on repossessed vehicles; and stipulate to its dealers that such procedures must be observed. The order requires GM and its subsidiary, General Motors Acceptance Corporation (GMAC), to institute extensive training programs to familiarize dealers with their obligations in handling repossessed vehicles. Following such training, GM is required to conduct a series of field audits to ensure that surpluses are being calculated and paid in a prescribed manner. GMAC is further required to pay $2 million to eligible consumers whose vehicles were repossessed by the company since May 1, 1974. Additionally, GMAC's post-repossession notices and other relevant documents must include accurate and complete information concerning the nature and duration of customers' rights to redemption and surpluses; and that bulletins be sent to dealers whose arrangements with the company did not call for "title clearance," advising them of their obligations to pay surpluses on repossessed vehicles.

Appearances

For the Commission: *Randall H. Brook, Dean A. Fournier, Ivan Orton, Sharon S. Armstrong, Gregory Colvin* and *Sarah Jane Hughes.*

For the respondents: *Otis M. Smith, Robert C. Weinbaum* and *Stephen P. Ormond*, Detroit, Mich. and *Patrick Leach, Weil, Gotshal & Manges*, New York City, for respondent General Motors Corporation. *Nancy L. Buc, Weil, Gotshal & Manges*, Washington D.C., *Carl D. Lobell, Weil, Gotshal & Manges*, New York City and *John J. Higgins*, New York City, for respondent General Motors Acceptance Corporation. *Robert C. St. Louis, Aiken, St. Louis & Siljeg*, Seattle, Wash., for respondent Chuck Olson Chevrolet, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Motors Corporation, General Motors Acceptance Corporation, and Chuck Olson Chevrolet, Inc., corporations, have violated the provisions of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint.

Paragraph 1. *Respondents.* Respondent General Motors Corporation ("GM") is a Delaware corporation with its office and principal place of business at 3044 West Grand Boulevard, Detroit, Michigan.

Respondent General Motors Acceptance Corporation ("GMAC") is a Delaware corporation with its office and principal place of business at 761 Fifth Ave., New York, New York. It is a wholly-owned subsidiary of GM.

Respondent Chuck Olson Chevrolet, Inc. ("Olson") is a Washington corporation with its office and principal place of business at 17545 Aurora Ave. North, Seattle, Washington.

Allegations stated below in the present tense include the past tense.

Par. 2. *Respondents' Business.* GM manufactures, distributes and sells motor vehicles, including automobiles and trucks. It also owns all or part of the voting stock of various retail dealers of its vehicles, whose business operations and policies it controls. It is responsible for the acts and practices of its wholly- or partially-owned dealers, as described below.

Wholly- or partially-owned as well as independent retail GM dealers are referred to below as "GM dealers."

GMAC is a finance company, wholly-owned by GM, which provides retail financing to customers of GM dealers for their retail installment contract purchases of new and used motor vehicles. It also provides wholesale financing for inventories held by GM dealers.

Olson is an independent GM dealer selling new and used motor vehicles.

Par. 3. *Commerce.* Each of respondents participates in some or all phases of the sale, distribution and repossession of motor vehicles, and in the transmission across state lines of contracts, monies, and other business papers related to the extension and enforcement of credit obligations. Respondents each maintain a substantial course of trade in motor vehicles and motor vehicle credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Par. 4. *Retail Installment Contract Sales.* Olson and most other GM dealers arrange financing through GMAC or other lenders for retail sales of motor vehicles to their customers. Most of the sales to be financed by GMAC are executed on a printed "retail installment contract" form provided by GMAC, naming the customer as buyer and the dealer as seller. This "retail installment contract" form indicates that the contract will be assigned to GMAC for value, that the buyer is to be indebted to the dealer or its assignee, and that the dealer or its assignee is to be a secured party holding security interest in the vehicle sold. In the event the buyer defaults, GMAC and Olson and other GM dealers have also expressly undertaken the obligation, by express or implied representations contained in their retail installment contracts, to make a proper disposition of the repossessed collateral and to account to the defaulting buyer for any surplus arising therefrom. These representations have the tendency and capacity to lead buyers to a reasonable expectation that GMAC or the dealer will properly dispose of the vehicle and refund any surplus.

PAR. 5. *Statutory Duty to Account for Surplus.* The respective rights and duties of the defaulting buyer and secured party after repossession are defined by state commercial law, derived by almost every state from Article Nine of the Uniform Commercial Code, and the retail installment contract. State law requires the secured party, after repossessing and disposing of the collateral, to account to the defaulting buyer for any surplus of proceeds from the sale or disposition in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees.

PAR. 6. *Post-Default Procedures Determined by Master Agreement.* In instances where GMAC as secured party declares a default, it usually repossesses or causes repossession of the vehicle. The procedures followed by GMAC and the dealer after repossession are determined by a master "GMAC Retail Plan" between GMAC and the dealer, as well as by the terms of the assignment of each retail installment contract to GMAC, and by additional terms and conditions specified from time to time. A substantial majority of the agreements executed between GMAC and GM dealers in the United States are recourse, repurchase, guaranty or similar agreements (hereinafter "recourse" agreements).

PAR. 7. *Recourse Transfer and Payoff.* Pursuant to the agreements described in Paragraph Six, GMAC in most cases returns the repossessed vehicle to the recourse dealer within a specified time, and receives from the dealer a payoff consisting of the unpaid balance of the retail installment contract adjusted by applicable charges and credits. The dealer then resells the vehicle to a third party.

PAR. 8. *Recourse "Title Clearance".* Before returning the vehicle to the recourse dealer, GMAC claims to offer the vehicle for sale, purporting to comply with the public (or private) sale method of disposition of collateral authorized by the Uniform Commercial Code and other state laws. GMAC claims that this procedure "clears title" to the vehicle, extinguishing the defaulting buyer's equity interest in the vehicle, cutting off the buyer's redemption rights, and establishing the amount of deficiency or surplus. In truth and in fact:

A. GMAC does not make reasonable efforts to procure the attendance of competing bidders or buyers at such sales. Hardly anyone ever appears to bid or buy at the "title clearance" sale except a representative of GMAC. GMAC routinely purchases the vehicle from itself, and no money transfer or accounting entry is made.

B. GMAC almost always declares a substantial deficiency based on the "sale," and surpluses are almost never produced.

C. After the vehicle is returned to the recourse dealer, the dealer's payoff compensates GMAC for the entire debt owed by the defaulting buyer, including the deficiency.

D. The subsequent resale by the dealer is almost always made at a higher price than the GMAC "title clearance" sale. Thus, any loss produced by the dealer's resale is much less than the deficiency declared by GMAC, and in a substantial number of instances a surplus is realized.

This "title clearance" method of disposition is a sham, an improper performance of the repossessing secured party's duty, as a fiduciary and trustee, to respect the defaulting buyer's equity interest in the vehicle. As a method of disposition, GMAC's sale procedure is not commercially reasonable, not conducted in good faith, and is therefore violative of the Uniform Commercial Code. The recourse dealer's subsequent resale is the actual dispostion of collateral, not GMAC's intervening sale to itself.

Therefore, the method of dispostion of repossessed motor vehicles described above is unfair and deceptive.

Par. 9. *Non-Recourse "Title Clearance"*. In a number of cases GMAC does not return the repossessed vehicle to the original selling dealer, including but not limited to cases where there is no recourse agreement in effect or where the conditions for enforcing the recourse obligation are not met. In many of these instances, GMAC sells the vehicle to itself, using the same "title clearance" method described in Paragraph Eight, and then resells the vehicle to a third party shortly thereafter, usually well within any applicable period specified by state law for a proper disposition. Again, GMAC declares a substantial deficiency based on the "title clearance" sale. The subsequent, third-party sale is frequently made at a higher price than the "title clearance" sale. When it is, the loss produced by the subsequent sale is less than the deficiency declared by GMAC, and in some cases a surplus may be realized.

The sale to a third party is the actual disposition and, applying the same standards of fiduciary duty, commercial reasonableness and good faith set forth in Paragraph Eight, GMAC's "title clearance" sale to itself is unfair and deceptive.

PAR. 10. *Other Surpluses Paid to Dealers.* GMAC has had a procedure by which it may, under certain circumstances, elect not to return a vehicle to a recourse dealer but to sell the vehicle to a third party, with or without an intervening "title clearance" sale, while still holding the dealership to its recourse obligation. If a surplus results from such a disposition, GMAC's procedures call for paying or crediting the surplus amount to the dealer, not to the defaulting buyer. This practice violates the Uniform Commercial Code and is unfair and deceptive.

PAR. 11. *Joint Liability.* Under applicable state law, a recourse dealer who receives a transfer of collateral from a secured party has a duty to properly dispose of the collateral and to account to the defaulting buyer for any surplus. The dealer has this obligation when the transfer is direct, but also when GMAC holds a "title clearance" sale prior to the transfer, as it does in the vast majority of recourse repossessions. GMAC also is obligated to ensure that a proper disposition of the collateral is made and that a proper accounting for any surplus is given to the defaulting buyer. GMAC shares this obligation jointly with the dealer because (1) it continues to be the secured party and continues to be a fiduciary with respect to the defaulting buyer's equity interest; (2) GMAC, as assignor of the contractual duties of a secured party, continues to be liable for the performance of those duties; (3) GMAC has dictated, controlled and acted jointly with the recourse dealer in executing relevant aspects of the credit transaction; and (4) GMAC has made representations to buyers, as set forth in Paragraph Four, that these duties would be properly performed.

PAR. 12. *Failure to Account for Surpluses.* With reference to the surpluses realized on the dealer's disposition as described in Paragraph Eight, and on GMAC's own resale as described in Paragraphs Nine and Ten, GMAC, Olson and other GM recourse dealers have in a substantial number of instances (1) failed to institute or follow correct procedures for determining the existence or amounts of these surpluses, (2) failed to disclose the existence of these surpluses to defaulting buyers, and (3) wrongfully retained such surpluses in violation of the defaulting buyers' statutory and contractual rights. The failure to identify and disclose surpluses has concealed their existence from these consumers and consequently few have asserted their rights under applicable state law. The failure to remit surpluses has deprived numerous consumers of substantial amounts of money rightfully theirs and has unjustly enriched GMAC and its recourse dealers. These practices are therefore unfair and deceptive.

PAR. 13. *Pursuit of Excessive Deficiencies.* GMAC collects or attempts to collect from defaulting buyers many of the deficiencies it declares based on the "title clearance" procedure described in Paragraphs Eight and Nine. Some of the deficiencies are assigned to recourse dealers or others for collection. Whether GMAC or the dealer pursues the deficiency, the amount collected may be shared between them. Such collection efforts have the tendency and capactiy to induce defaulting buyers to pay sums to which GMAC or its assigns are not entitled or to otherwise change their positions to their detriment. To the extent that deficiency amounts collected from defaulting buyers exceed the deficiency produced by the recourse dealers' resale, or exceed the deficiency produced by GMAC's subsequent resale (either of which may have in fact produced a surplus), these buyers have been deprived of substantial sums of money, unjustly enriching GMAC and its dealers. This practice is therefore unfair and deceptive.

PAR. 14. *Misrepresentation of Right to Deficiency.* GMAC represents to defaulting buyers that they may be liable for deficiencies on repossessed motor vehicles in instances where state law limits or denies this liability. These representations have the tendency and capacity to induce defaulting buyers to pay sums to which the dealer, GMAC, or its assigns are not entitled or otherwise to change their position to their detriment. Therefore, use of these misleading contracts is unfair and deceptive.

PAR. 15. *Failure to Disclose Material Facts Concerning Redemption.* GMAC and its recourse dealers fail, in some instances, to inform defaulting buyers of facts necessary to their exercise of the right of redemption granted by state law, including but not limited to (1) the nature and duration of the right to redeem, and (2) the amount required to redeem. This failure to disclose material facts has the tendency and capacity to hinder defaulting buyers in exercising the right to redeem and is therefore an unfair and deceptive act or practice.

PAR. 16. *Owned GM Dealers Using Non-GMAC Financing.* A number of wholly- or partially-owned GM dealers engage in the acts and practices ascribed to dealers in Paragraphs Twelve through Fifteen, in instances where retail installment financing for their customers is obtained from finance institutions other than GMAC. These acts and practices, for the reasons stated above, are unfair and deceptive.

PAR. 17. *Conclusion.* The acts and practices of respondents set forth in Paragraphs Eight through Ten, and Twelve through Sixteen are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission has issued its complaint charging the respondents with violation of Section 5 of the Federal Trade Commission Act, as amended. The respondents have been served with a copy of that complaint, together with a notice of contemplated relief.

The respondents, their attorneys, and counsel for the Commission have executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules.

The Secretary of the Commission has withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules.

The Commission has considered the matter and has accepted the executed consent agreement and placed the agreement on the public record for a period of 60 days and has considered the comments filed pursuant to Section 3.25 of its Rules. In accordance with Section 3.25(f) of its Rules, the Commission makes the following jurisdictional findings and enters the following order:

1. Respondent General Motors Corporation is a Delaware corporation with its offices and principal place of business at 3044 West Grand Boulevard, Detroit, Michigan. Respondent General Motors Acceptance Corporation is a New York corporation with its offices and principal place of business at 767 Fifth Ave., New York, New York. General Motors Acceptance Corporation is a wholly-owned subsidiary of General Motors Corporation. General Motors Corporation and General Motors Acceptance Corporation are referred to as the "General Motors respondents."

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

It is ordered, That for purposes of this order the following definitions shall apply:

A. "General Motors respondents" or "respondents" means General Motors Corporation ("General Motors") and General Motors Acceptance Corporation ("GMAC"), corporations. It shall not refer to Chuck Olson Chevrolet, Inc. References to either or both of the General Motors respondents shall include their successors, assignees, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or devices through which they act in the United States. However, references to General Motors shall not include GMAC and references to either or both of the General Motors respondents shall not include dealerships. The requirements imposed on the General Motors respondents shall apply only to transactions within the United States.

B. "Vehicle" means an automobile or truck with a gross vehicle weight rating less than 11,000 pounds (4,990 kilograms) or a motor home. The term includes all parts, accessories and appurtenances of the vehicle. A van is deemed a "truck."

C. "Dealership" or "dealer" means a corporation, partnership or proprietorship as to its operations within the United States pursuant to a Sales and Service Agreement with General Motors' Buick, Cadillac, Chevrolet, Oldsmobile, or Pontiac divisions, or the GMC Truck and Coach Division.

D. "Retail sale" means the sale of a vehicle by a dealer, other than for purposes of resale (e.g., sales to dealers or wholesalers), lease or rental, to a customer who is not a fleet purchaser.

E. "Recourse financing" means the financing of a retail sale subject to an agreement between a financing institution and a dealership (generally called a "repurchase," "recourse," or "guaranty" agreement) which provides that the dealership is obligated to pay off the outstanding obligation to the financing institution after receiving a transfer of the repossessed vehicle.

F. "Equity dealership" means a dealership in which General Motors holds 50 percent or more of the voting stock or is entitled to elect 50 percent or more of the board of directors.

G. "Financing customer" means a purchaser of a vehicle from a dealership by means of a retail installment contract.

H. "Disposition" or "dispose" means a dealership's sale or lease of a repossessed vehicle previously sold by that dealership and returned to it by or for a financing institution pursuant to a recourse agreement. Such sale or lease includes only transactions with an independent third party; i.e., it does not include a sale or lease to the financing institution, the dealership or a representative of either. Disposition or dispose shall not mean the transfer of a repossessed vehicle to a dealership pursuant to a recourse agreement, or to a person or firm liable under a guaranty, endorsement, or recourse agreement covering the repossessed vehicle, nor mean a sale subsequent to a judicial sale.

I. "Proceeds" means whatever is received for a repossessed vehicle upon its disposition, as proceeds are described in the Initial Compliance Report. Among other things, it does not include charges for separately priced warranties and service contacts itemized in the sales contract or lease.

J. "Allowable expenses" means only actual out-of-pocket expenses incurred as the result of a repossession. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for disposition and disposing of the vehicle, and not otherwise reimbursed to the dealership disposing of the vehicle. They are limited to the following charges (if permitted under applicable state law):

1. expenses paid to persons who are not employees of the dealership nor of the financing institution that financed the retail sale, for repossessing, towing or transporting the vehicle;

2. filing fees, court costs, cost of bonds, and fees and expenses paid to a sheriff or similar officer or to an attorney who is not an employee of the dealership nor of the financing institution, for obtaining possession of or title to the vehicle;

3. fees paid to others to obtain title to the vehicle, to obtain legally required inspection of the vehicle, or to register the vehicle;

4. amounts paid to others for storage (excluding a charge for storage at facilities operated by the dealership);

5. labor and associated parts and supplies furnished by the dealership for the repair, reconditioning or maintenance (including legally required inspections) of the vehicle in preparation for disposition, computed at dealer cost (as defined in the Initial Compliance Report) with appropriate adjustments for any insurance, service contract or warranty recovery;

6. amounts paid to others for labor and associated parts and supplies purchased for the repair, reconditioning or maintenance (including legally required inspections) of the vehicle in preparation for disposition;

7. cost of sales commissions paid for actual participation in the disposition of the particular vehicle, computed at a rate no higher than for the sale or lease, as applicable, of a similar, non-repossessed vehicle in similar circumstances, but excluding all portions of commissions attributable to the selling of service contracts, separately priced warranties, financing or insurance;

8. a proportionate share of expenditures for advertisements that specifically mention the particular vehicle;

9. fees and expenses paid to others for auctioning the vehicle;

10. amounts paid to others for communication (including telephone calls, postage and military locator fees) and photocopying necessary in arranging for the repossession, holding, transportation, reconditioning or disposition of the vehicle.

11. amounts paid to insure the particular vehicle while holding it.

K. "Contract balance" means (1) the unpaid balance as of the date of repossession, less any payments made thereafter and less applicable finance charge, insurance premium and service contract rebates deducted by the financing institution, plus (2) other charges authorized by contract or law and actually assessed or incurred prior to repossession. It may reflect a deduction for insurance, service contract and warranty payments received or to be received by the financing institution.

L. "Surplus" means:

+ proceeds
+ applicable insurance or warranty reimbursements received by the dealership or financing institution unless these reimbursements were deducted in computing the contract balance
+ any other applicable rebates or credits not deducted in computing the contract balance
– contract balance
– allowable expenses
– amounts paid to discharge any security interest in the vehicle provided for by law

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= Surplus. A negative (minus) amount produced by this calculation is referred to as a "deficiency"

M. "Pay" or "paid," in reference to payment of a surplus, means a diligent effort to pay in accordance with the standards set forth in the Initial Compliance Report.

II. Repossession Accounting Procedures

It is further ordered, That General Motors shall provide to all dealers within 10 days of service of this order, and to each new dealer within 30 days of entering into a Sales and Service Agreement, procedures for determining the existence of surpluses and for accounting for surpluses and for any deficiencies sought.

A. These procedures (the "repossession accounting procedures") shall, by physical insertion or as a supplement, be made a part of the

General Motors uniform accounting system referred to in the various dealer Sales and Service Agreements between General Motors and its dealers. These agreements provide that this system (currently called the "General Motors Dealers Standard Accounting System Manual") is to be followed in dealership operations. The requirement that the system be followed, insofar as it relates to the repossession accounting procedures, shall not be deleted from the Sales and Service Agreements, nor modified, without 60 days notice to the Commission. General Motors shall not implement the deletion or modification if the Commission, within that 60-day period, advises General Motors that it objects. The repossession accounting procedures shall also be incorporated into any subsequent set or compendium of comparable instructions.

B. The repossession accounting procedures shall include a standardized form ("dealer repossession accounting form") for dealers' use in determining for each vehicle the existence and amount of any surplus and of any deficiency sought, and in recording payment of each surplus, in accordance with the provisions of Paragraph C below.

C. The repossession accounting procedures shall provide that:

1. Each surplus is to be determined and paid to the recourse financing customer within 45 days of disposition in accordance with a method conforming to Paragraphs I.H through I.M of this order;

2. Expenses other than allowable expenses are not to be deducted in calculating surpluses and deficiencies sought;

3. Dispositions are to be commercially reasonable. The dealer should make the same efforts to obtain the best possible price for a repossessed vehicle as would be made for a comparable used vehicle, except that a dealer is not required to offer a warranty without extra charge even though such warranties are provided on other used vehicles. If state law sets forth particular requirements for the disposition of repossessed vehicles, the dealer should comply with those requirements but shall still attempt to obtain the best possible price consistent with those requirements.

4. If any rebate owed to the recourse financing customer's account has not been received at the time the dealer repossession accounting form is completed, such rebate is to be applied for promptly;

5. If any rebate is received after completion of the dealer repossession accounting form, any surplus or deficiency is to be redetermined and any remaining surplus paid within 45 days of disposition or within 10 days of receiving the rebate, whichever is later;

6. The dealer repossession accounting form is to be prepared by the dealer for each disposition of a repossessed vehicle and:

a. is to set forth the calculation of each surplus and of each deficiency sought;

b. is to identify the vehicle and the financing customer and be certified by a person authorized to sign retail installment contracts on behalf of the dealership;

c. a copy of the form is to be sent with the surplus payment to each recourse financing customer to whom a surplus is paid and is to be sent to each recourse financing customer from whom a deficiency is sought; and

d. is to be retained by the dealer, together with all relevant underlying documentation, for at least two years from the date of disposition.

7. Dealers are not to obtain or attempt to obtain waivers of surplus or redemption rights from recourse financing customers, except in the precise manner and under the precise circumstances contemplated by the applicable state law version of Section 9–505 of the Uniform Commercial Code. Under Section 9–505 a waiver of a customer's right to a surplus may not be sought unless the dealer intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business. If a waiver is sought, the dealer shall not represent that by proposing the waiver it proposes to forego its right to a deficiency judgment, unless it intends to seek such a judgment should the waiver not be given.

D. The repossession accounting procedures shall state that failure to adhere to the standards of subparagraphs C.1–.7 above or to account properly to customers for surpluses may expose the dealer to legal action by the Federal Trade Commission and/or consumers.

E. General Motors shall give the Federal Trade Commission 30 days advance notice of any change in its manner and form of carrying out the requirements of Part II of this order.

F. The repossession accounting procedures shall not apply to the sale of a repossessed vehicle subsequent to a judicial sale.

G. The Federal Trade Commission has proposed a Trade Regulation Rule that defines duties involved in disposing of a repossessed vehicle differently from the method described in subparagraph C.3 above. For this reason, that subparagraph is not to be considered a ratification or acceptance by the Commission of that method of disposition, except for purposes of this order.

III. Training and Notification

A. *It is further ordered*, That General Motors shall develop detailed educational materials and training to carry out the purposes of Part II of this order, and of Part VI (as related to reinstatement and redemption rights), as further described in the Initial Compliance Report. General Motors:

1. Shall provide the educational materials to every dealer within 10 days after service of this order.

2. Shall, commencing no later than 180 days after service of this order and in the normal course of providing seminars and other training, include detailed information on all pertinent aspects of Part II of this order and Part VI (as related to reinstatement and redemption rights) in all appropriate seminars and other training materials offered to dealers.

B. *It is further ordered*, That General Motors:

1. Shall, within 10 days after service of this order, send to each dealer a letter which contains information to the following effect:

a. State law requires that any surplus generated on the disposition of a repossessed vehicle must be paid to the defaulting customer.

b. The Federal Trade Commission has charged that secured parties' sales of repossessed vehicles to themselves are of no effect in computing a customer's deficiency or surplus. With regard to these charges, GMAC has been prohibited from purchasing a repossessed vehicle at any sale it conducts and has been ordered to make payments to some customers whose repossessed vehicles were purchased by GMAC at a sale which it conducted.

c. The duty to pay surpluses has existed for many years, and the company urges dealers to pay all surpluses on repossessed vehicles disposed of by them, except for past GMAC repossessions which were not subject to the reassignment option of the GMAC Retail Plan. This duty covers surpluses arising prior to the date of the letter, as well as those arising later.

d. As of the date of this letter, the law of virtually all states provides that if a dealer does not pay a surplus owed, the defaulting customer has the right to recover a penalty equal to "an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price".

e. If a customer to whom a surplus is owed has been reported by the dealer or its agent (including a collection agency) to a credit reporting agency as owing a deficiency, the dealer should promptly advise the credit reporting agency of the correct facts.

f. The Federal Trade Commission has issued complaints against three automobile dealers charging that their failure to pay past surpluses violated federal law.

2. Shall include in the above mailing a copy of the Commission's published Analysis of Consent Order.

3. Shall, within 90 days after service of this order, develop and provide to all Motors Holding branch personnel (other than clerical employees) educational materials and training to carry out the purposes of Parts II and V of this order, as further described in the Initial Compliance Report.

4. Shall, if certain acts or practices are found unlawful in Docket 9072, 9073 or 9074, mail a set of documents, to be provided by the Commission at a later date, for the purpose of notifying dealerships that those acts or practices have been found unlawful. The mailing shall be certified mail, return receipt requested, to each dealership president (or Dealer Operator, as that term is defined in General Motors Sales and Service Agreements). General Motors shall provide the Commission with a certification of mailing by a responsible official, including a statement that the mailing list used was complete at the time of mailing to the best of the certifier's knowledge. It shall maintain the receipts for at least three years after (1) the last audit summary is submitted pursuant to Paragraph IV.C of this order, or (2) the mailing is completed, whichever comes later. General Motors may include a covering letter or transmittal sheet in the mailing, with language subject to the approval of the Commission or its authorized representatives.

C. *It is further ordered*, That GMAC:

1. Shall, within 60 days after service of this order, send a letter explaining the duty to pay past surpluses to each dealer to which GMAC returned a repossessed vehicle between May 1, 1974 and service of this order where the dealer executed the reassignment option of the GMAC Retail Plan.

2. Shall, within 90 days after service of this order, develop and provide to all GMAC branch personnel involved in recourse financing transactions (other than clerical employees) educational materials and training to carry out the purposes of Parts II and VI of this order, as further described in the Initial Compliance Report.

D. *It is further ordered*, That General Motors shall issue no new materials or instructions to dealers inconsistent with this order and shall provide no materials or instructions to dealers inconsistent with this order after 180 days after service of this order.

IV. Dealer Audits

A. To determine whether dealers are correctly calculating and paying surpluses after implementation of Parts II and III of this order, General Motors shall conduct audits of dealers with respect to their disposition of repossessed vehicles. The audit process shall:

1. Consist of four successive twelve-month auditing periods, the first to begin approximately 190 days after service of this order.

2. Include 300 recourse dealers per twelve-month auditing period, selected pursuant to the method set forth in the Initial Compliance Report. In addition, each dealer found in the preceding auditing period to have had transactions in which the dealer failed to follow the repossession accounting procedures in calculating surpluses and deficiencies sought or in paying surpluses will be included, limited to one reaudit per dealer.

3. Consist of an audit of each dealer's repossession accounting forms, with resort to all necessary underlying records, as described in the Initial Compliance Report. The audit shall include for each dealer audited the preparation of a summary ("dealer summary report") which shall contain:

a. the name and address of the dealership;

b. the number of dispositions audited;

c. the number and dollar value of surpluses properly calculated and paid;

d. the number and dollar value of surpluses as to which attempts to pay were unsuccessful;

e. the number of repossessed vehicles sold at wholesale;

f. description of any failures to follow the repossession accounting procedures other than in calculating surpluses or deficiencies sought or in paying surpluses;

g. the number of dispositions in which the dealer failed to follow the repossession accounting procedures in calculating surpluses and deficiencies sought or in paying surpluses, and, for each of these dispositions: (1) a statement of the nature of the failure; (2) a form, described in the Initial Compliance Report, on which the auditor will list all documents in the dealer's files which contain information which should be stated on the dealer repossession accounting form and set forth that information; and (3) any worksheet(s) the auditor prepares in connection with that disposition;

h. a certification by the auditor that the dealer summary report is accurate to the best of the auditor's knowledge and that the auditor has informed the dealership in writing that it should retain for at least 2 years after the audit all documents relating to any disposition under subparagraph A.3.g.

4. Include, for each dealer audited, each recourse financing repossession disposed of by the dealer during a preceding twelve-month period (defined in the Initial Compliance Report). Dispositions in which the repossession occurs prior to 30 days after General Motors provides

dealers with the repossession accounting procedures need not be included.

B. Audit reports and documents prepared during an audit pursuant to Paragraph A shall be maintained by General Motors for three years following the end of the twelve-month auditing period for which they are prepared.

C. General Motors shall file with the Commission an audit summary for each twelve-month auditing period described in subparagraph A.1. Each summary shall be filed 90 days after the completion of the auditing period. These summaries shall contain the following information in aggregate form:

1. the number of dealers audited;
2. the number of dispositions audited;
3. the number and total dollar value of surpluses properly calculated and paid;
4. the number and total dollar value of surpluses as to which attempts to pay were unsuccessful;
5. the number of dispositions in which the repossessed vehicle was sold at wholesale;
6. the number of dispositions in which there was a failure to follow the repossession accounting procedures in calculating and in paying a surplus, the number of dealerships involved, and the total additional dollar amount the dealerships should have paid according to the repossession accounting procedures;
7. the number of dispositions in which a deficiency was sought, the number of those in which there was a failure to follow the repossession accounting procedures in calculating the deficiency and the number of dealerships involved in these failures; and
8. a statement describing the steps that General Motors took to contact dealerships which were discovered during an audit to have failed to follow the repossession accounting procedures in calculating surpluses or deficiencies sought or in paying surpluses.

D. The audits described in Paragraph A shall be conducted by General Motors' Sales Section or by other qualified representatives designated by General Motors, in accordance with procedures described in this order and in the Initial Compliance Report. The following procedures shall be followed:

1. The General Motors respondents shall not inform dealers or other third parties of the audit procedure or the identity of dealers selected for audit, except to the extent described in this Order.
2. No dealer selected for audit under this Part IV shall be given more than ten business days advance notice of the scheduled audit.

V. Equity Dealership Procedures and Monetary Payments

It is further ordered, That:

A. Within 60 days after service of this order, or within 60 days after issuance of stock in any new equity dealership, General Motors shall, as a shareholder in equity dealerships, present and support resolutions for consideration by the boards of directors of those dealerships, which provide that:

1. the dealership's accounting practices will be conformed to the repossession accounting procedures described in Part II above; and
2. surpluses and deficiencies will be calculated and surpluses paid according to the repossession accounting procedures.

B. Within 100 days after service of this order, General Motors shall advise the Federal Trade Commission in writing of the number of equity dealerships which did not adopt the resolutions described in Paragraph V.A.

C. General Motors shall, during each accounting systems examination ("systems exam") it conducts at an equity dealership, determine if the dealership has, since the last systems exam, calculated surpluses and deficiencies sought and paid surpluses according to the repossession accounting procedures. The systems examiner shall review all accounts in which the repossessed vehicle was disposed of during the period beginning 45 days prior to the preceeding systems exam and ending 45 days prior to the current systems exam. For these accounts the examiner shall review the dealer repossession accounting forms with resort to all necessary underlying records. Dispositions in which the repossession occurs prior to 30 days after General Motors has provided dealerships with the repossession accounting procedures need not be reviewed. Systems exams shall be conducted to examine repossession disposition(s) at least once each year for each equity dealership.

D. When a systems exam or other reliable information discloses the failure of an equity dealership to calculate surpluses or deficiencies sought or pay surpluses according to the repossession accounting procedures, General Motors shall, as a shareholder:

1. request the dealership's board of directors to review with the dealer operator the repossession accounting procedures;
2. send copies of the relevant portions of the systems exam, or the substance of the reliable information, to each of the dealership's board members; and
3. request the dealership's board members to take steps to insure

that surpluses and deficiencies sought are calculated and surpluses paid in accordance with the repossession accounting procedures.

E. In the course of the first systems exam for a dealership following action taken by General Motors under Paragraph D above, GM shall determine whether all the failures have been corrected. If the failures have not been corrected, GM shall include those failures in an aggregate report compiled at the end of each calendar year. This report shall state the number of dealers with those uncorrected failures, the number and amount of surpluses involved, and the number and amount of excess deficiencies involved.

F. For each equity dealership which, during the report period defined in Paragraph G below, failed to calculate a surplus or deficiency sought, or to pay a surplus, in accordance with the repossession accounting procedures, General Motors shall prepare an examination summary. This summary shall be retained for a period of 3 years following the submission of the equity dealership report referred to in Paragraph G below. It shall contain:

1. the name and address of the dealership;
2. the number of dispositions examined;
3. the number and dollar value of surpluses properly calculated and paid;
4. the number and dollar value of surpluses as to which attempts to pay were unsuccessful;
5. the number of repossessed vehicles sold at wholesale;
6. description of any failures to follow the repossession accounting procedures other than in calculating surpluses or deficiencies sought or in paying surpluses;
7. the number of dispositions in which the dealer failed to follow the repossession accounting procedures in calculating surpluses or deficiencies sought or in paying surpluses, and, for each such disposition, the amount of surplus unpaid or excess deficiency sought, copies of the examiner's worksheets dealing with the disposition, a statement of the nature of the failure, and a certification by the examiner that the examination summary is correct to the best of his or her knowledge. In addition, the examiner shall attach photocopies of all records examined which are necessary to document each of these dispositions.

G. General Motors shall file with the Commission a report with respect to equity dealerships ("equity dealership report"), within 28 months after General Motors has provided dealers with the repossession accounting procedures. The equity dealership report shall cover systems exams completed within two years after the 30-day period described in Paragraph C above. This two-year period is called the "report period." The equity dealership report shall state the total number of equity dealerships examined and shall contain the following information in aggregate form with respect to equity dealerships which failed during the report period to follow the repossession accounting procedures in calculating surpluses or deficiencies sought or in paying surpluses:

1. the number of dealers;
2. the number of dispositions examined;
3. the number and total dollar value of surpluses properly calculated and paid;
4. the number and total dollar value of surpluses as to which attempts to pay were unsuccessful;
5. the number of dispositions in which the repossessed vehicle was sold at wholesale;
6. the number of dispositions in which there was a failure to follow the repossession accounting procedures in calculating or paying a surplus, the number of dealerships involved and the total additional dollar amount the dealerships should have paid according to the repossession accounting procedures;
7. the number of dispositions in which a deficiency was sought, the number of those in which there was a failure to follow the repossession accounting procedures in calculating the deficiency and the number of dealerships involved in those failures.

H. In the event that more than 10 percent of the equity dealerships had dispositions during the report period which failed to follow the repossession accounting procedures in calculating surpluses or deficiencies sought or in paying surpluses, the Federal Trade Commission shall have the right to reopen this proceeding against General Motors solely with regard to the issue of General Motors' alleged responsibility for equity dealerships' failure properly to calculate surpluses and deficiencies sought or to pay surpluses on repossession dispositions. If this reopening occurs, no charges or evidence shall be based on any disposition where GMAC was the financing institution and the financing plan called for a prior sale (title clearance) by GMAC or where GMAC held a prior sale (title clearance) in connection with a recourse obligation.

I. General Motors shall, within 180 days of service of this order, with respect to all repossessed vehicles returned between May 1, 1974 and 40 days after service of this order (a) to dealerships which are equity dealerships as of the date of service of this order or (b) to dealerships which were equity dealerships at the time the vehicle was returned to the dealership and were liquidated while equity dealerships between May 1, 1974 and December 31, 1978, establish to the reasonable satisfaction of the Commission, as described in the Initial Compliance Report, that:

1. all surpluses have been offered to financing customers and paid to those who have executed a release; and

2. in each instance where a customer entitled to receive a surplus had been previously reported by the dealership or its agent (including a collection agency) to a credit reporting agency as owing a deficiency, the credit reporting agency has been subsequently advised of the correct facts.

With respect to vehicles repossessed by GMAC, Paragraph I shall apply only to vehicles subject to the reassignment option of the GMAC Retail Plan.

VI. GMAC Retail Plan Changes, Deficiency Representations, Post-Repossession Notices

It is further ordered, That GMAC:

A. Shall, in connection with the extension and enforcement of retail credit obligations relating to the sale of vehicles by dealers, cease and desist from:

1. Purchasing a repossessed vehicle at or through any type of sale (title clearance) conducted by GMAC.

2. Misrepresenting, directly or indirectly, orally, in writing, or in any other manner, that the debtor may be liable to pay a deficiency where GMAC knows or should know that it is not entitled under state or federal law to collect a deficiency.

3. Collecting or attempting to collect a deficiency from a defaulting customer, or from his or her successors or assigns, where GMAC knows or should know that (a) it is not entitled under state or federal law to collect such deficiency, or (b) such deficiency is greater than the amount determined in accordance with the definitions set forth in Part I of this order. For purposes of this subparagraph the definitions of "proceeds" and "allowable expenses" will apply to GMAC's own dispositions.

4. Obtaining or attempting to obtain waivers of redemption or surplus rights from financing customers, except in the precise manner and under the precise circumstances contemplated by the applicable state law version of Section 9–505 of the Uniform Commercial Code. Under Section 9–505 a waiver of a customer's right to a surplus may

not be sought unless GMAC intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business or to return it to a dealer pursuant to a recourse agreement. If a waiver is sought, GMAC shall not represent that by proposing the waiver it proposes to forego its right to a deficiency judgment, unless it intends to seek such a judgment should the waiver not be given.

Subparagraph A.1 shall become effective 40 days after service of this order. Subparagraphs A.2-.3 shall not apply to dispositions involving repossessions occurring prior to service of this order.

B. Shall incorporate, by addendum or otherwise, provisions to the following effect into its Retail Plan as it relates to recourse financing within 60 days after service of this order, and into any subsequent edition or successor document:

1. dealers are to permit redemption by the customer whose vehicle has been repossessed, at any time until there is a binding agreement for disposition, except where the dealer has obtained a waiver under subparagraph II.C.7;

2. dealers are to permit redemption in accordance with the post-repossession notice sent by GMAC to the customer, except where the dealer has obtained a waiver under subparagraph II.C.7;

3. dealers are to determine whether a surplus exists on a recourse financing repossession according to the repossession accounting procedures described in Part II of this order;

4. in determining surpluses and deficiencies, dealers are not to deduct expenses other than allowable expenses;

5. dealers are to account for and pay each surplus within 45 days of disposition.

C. Shall develop revised retail installment contract forms which (except as modified as described in Paragraph D below) include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than reasonable expenses incurred as a direct result of repossessing, holding, preparing for disposition and disposing of the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and

2. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer.

D. Shall distribute the revised retail installment contract forms to all dealers who use GMAC forms within one year after the Commission issues a final rule or final adjudicated order not less restrictive than the Paragraph C statements of allowable expenses and the duty to pay surpluses. If the final rule or final adjudicated order is less restrictive than the Paragraph C statements, GMAC shall complete the distribution within one year after the Commission has modified Paragraph C to render it consistent with the final rule or final adjudicated order. GMAC shall direct its branch offices that, commencing two weeks after the distribution to a dealership of the revised GMAC retail installment contract forms, they are not to purchase from that dealership GMAC forms of retail installment contracts that are not on the revised forms. For two years thereafter, GMAC shall periodically examine its branch office files, in accordance with its usual monitoring procedures, to determine whether GMAC's prior retail installment contract forms are being used, and if so, shall institute appropriate corrective action.

E. Shall, within 60 days after service of this order, establish and follow a procedure for uniformly sending a written notice ("post-repossession notice") to GMAC financing customers as soon as practicable after repossession.

1. GMAC shall periodically examine its branches' files, in accordance with its usual monitoring procedures to determine whether the post-repossession notices have been and are being sent and shall institute appropriate actions to assure that the procedure for sending post-repossession notices is adhered to.

2. The post-repossession notice shall have a GMAC heading and shall specify in clear, lay language:

a. the name and address of the place at which the vehicle is being stored and the address and telephone number of the GMAC branch office to be contacted;

b. the date or interval of time within which the customer may redeem by reinstating the contract in states where the creditor is required to permit reinstatement of the contract;

c. the amount necessary to redeem by reinstating the contract at the time the notice is dated, if the customer is entitled to or will be permitted to redeem by reinstatement;

d. the net amount necessary to redeem by discharging the customer's obligation at the time the notice is dated, except where the customer is entitled to or will be permitted reinstatement until the vehicle is disposed of;

e. the date or interval of time prior to which the vehicle will not be disposed of;

f. that the vehicle can be redeemed at any time prior to a binding agreement for its disposition;

g. that additional expenses may be incurred and may increase the amount necessary to redeem the vehicle if redemption is delayed (as further described in the Initial Compliance Report);

h. that GMAC should be contacted for further information about getting the vehicle back;

i. that any surplus resulting from a sale or lease must be paid to the customer within 45 days after disposition (the notice may also state that an agreement between the dealer and GMAC provides that the dealer is to pay any surplus);

j. that failure to account for and pay a surplus may give the customer a right to sue for the amount of the surplus and for any penalties provided by law;

k. that the customer will be liable for a deficiency or that the deficiency cannot be collected (the notice is to include the applicable language only);

l. that the customer should call the insurance company or the dealer to make sure that any insurance or service contract has been cancelled and that the customer has a right to credit for any refunds.

F. Shall issue no new materials to dealers inconsistent with this order and, commencing three months and to be completed no later than twelve months after service of this order, shall review all pertinent GMAC forms, form letters, notices and internal written procedures and make them consistent with the provisions of this order.

G. In any action by the Commission seeking civil penalties for a violation of subparagraphs A.2-.4 and Paragraph E, GMAC may not be held liable if it shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. In applying this paragraph, judicial interpretations of Section 130(c) of the Truth In Lending Act, 15 U.S.C. 1640(c) (1974), shall be used.

VII. Monetary Payments by GMAC

It is further ordered, That GMAC shall pay $2 million to financing customers whose vehicles were repossessed by GMAC. The money will be distributed as follows:

A. For each financing customer whose account (1) was charted by Commission complaint counsel as an alleged surplus, which chart was provided to GMAC by May 31, 1978; and (2) involved a vehicle repossessed by GMAC which was not subject to the reassignment option of the GMAC Retail Plan, GMAC shall offer, within 60 days after service of this order, to pay the amount alleged as an unpaid surplus on the chart. The offering letter will be modelled on the letter described in subparagraph C.4 below. GMAC shall promptly pay the offered amount to each financing customer who properly signs and returns the release.

B. GMAC shall ascertain the public sale (title clearance) price and the contract balance as shown on its Bills Receivable card ("BR card") or, if the BR card can not be located, as shown in the repossession file, for the account of each financing customer whose contract was purchased by GMAC, where: (1) the vehicle was repossessed on or after May 1, 1974 and was returned to the dealer before GMAC implements subparagraph VI.A.1; (2) GMAC purchased the vehicle at a public sale (title clearance) which it conducted and returned the vehicle to the dealer pursuant to a recourse agreement; (3) the vehicle was not redeemed; (4) the contract balance is available as stated above; and (5) the financing customer was not covered by Paragraph VII.A. For repossessed vehicles where the public sale (title clearance) price is not available in the file, GMAC shall use as the public sale (title clearance) price an estimated value.

C. GMAC will pay to financing customers an amount (the "Fund") equal to $2 million minus the sum actually distributed pursuant to Paragraph A, in the following manner:

1. This Paragraph will apply to financing customers whose vehicles fall within Paragraph B.

2. A calculated "difference" is the public sale (title clearance) price adjusted as described below less the customer's contract balance as determined in Paragraph B above. All prorating referred to below shall be based on calculated differences.

3. GMAC will generate a list of customers eligible for payments by increasing the public sale (title clearance) price of each vehicle by an equal percentage until the sum of all the differences greater than or equal to $25 equals approximately twice the Fund. Those customers with positive differences greater than or equal to $25 are the eligible customers. GMAC will then prorate the Fund among the eligible customers. In prorating the Fund, no eligible customer will be assigned less than $25 or more than $700.

4. GMAC will send a letter and release (Attachment A to this order) to each eligible customer, identified in subparagraph C.3 above. The letter will state that, pursuant to a consent agreement executed by GMAC and the Federal Trade Commission, GMAC is offering to pay that person at least the prorated sum computed pursuant to subparagraph C.3. The letter will also state that, in order to receive the payment, the customer must waive any claims the customer may have against GMAC, GM or any GM dealers, or their directors or employees,

with regard to the repossession, handling, storage and disposition of the vehicle by signing and returning the release attached to the letter. The customer will have 60 days from the date of the letter to return the signed release.

5. If GMAC has received properly signed and returned releases covering an aggregate of at least 50 percent of the Fund by the end of the 80th day after mailing the last letter pursuant to subparagraph C.4, GMAC will prorate the Fund among those customers who have properly signed and returned releases. Any difference which exceeds $700 after proration will be deemed equal to $700 and the excess shall be distributed as part of the remaining Fund. Any amount less than $25 will be deemed equal to $25 with the excess deducted from the Fund. GMAC shall, within 60 days after the end of the 80-day period, pay the total amount calculated under subparagraph C.3 and this subparagraph C.5 to these financing customers.

6. If GMAC has not received properly signed and returned releases covering at least 50 percent of the Fund by the end of the 80th day after mailing the last letter pursuant to subparagraph C.4, GMAC shall:

a. Delete from its subparagraph C.1 list the names of all financing customers who were sent releases but who failed to sign and return them.

b. Generate a new list of eligible customers and calculated differences from the now-reduced subparagraph C.1 list. This list will be created by further increasing the public sale (title clearance) price of each vehicle, again by an equal percentage. The procedure for generating the new list will take into account the rate of return of properly signed and returned releases experienced under subparagraph C.4.

c. Promptly pay the eligible customers in subparagraph C.6.b who properly signed and returned the subparagraph C.4 releases the differences recalculated under subparagraph C.6.b. Any amount which exceeds $700 will be deemed equal to $700, with the excess distributed as part of the remaining Fund. Any amount less than $25 will be deemed equal to $25 with the excess deducted from the Fund. Payments made will reduce the Fund accordingly.

d. The additional eligible customers (if any) in subparagraph C.6.b will be sent the form of letter and offer described in subparagraph C.4 within 60 days of the end of the 80 day period described in subparagraph C.5. The amount offered to each will be a prorated portion of the Fund remaining after the deductions for subparagraph C.6.c payments. At the end of 80 days after the last letter is mailed to the additional eligible customers, GMAC shall prorate the remaining Fund among those additional eligible customers who have properly signed and returned releases and shall promptly pay those recalculated amounts. The same minimum and maximum amounts as in subparagraphs C.3 and C.5 will apply to offers and payments under this subparagraph.

D. If GMAC offers payment to a financing customer pursuant to Part VII, its obligation under this order to make payment to that customer shall terminate upon expiration of the 60 days provided in the offer. However, GMAC may pay financing customers on the basis of releases mailed subsequent to the expiration of the 60 day period and may deduct from the Fund any sums so distributed.

E. GMAC shall send the letters described in subparagraph C.4 as soon as practicable, but no later than one year after service of this order

F. In performing its obligations under Part VII, GMAC may employ its records as found. GMAC shall not be required to collect data not presently available in its repossession files, nor to search files for accounts involving repossessed vehicles which were returned to dealers during periods in which the dealer had executed the reassignment option of the GMAC Retail Plan. A public sale (title clearance) shall be deemed to have been held in all cases where the vehicle was returned pursuant to a recourse obligation to a dealer who had not executed the reassignment option.

G. GMAC shall maintain procedures to verify the eligibility of any inquiring person for a monetary payment up to the expiration of all time periods for claiming payments. These procedures shall include providing the Commission with a single GMAC address to which all public inquiries regarding eligibility can be directed.

VIII. Effect of Inconsistent Rule or Order

It is further ordered, That:

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, financing companies or dealerships than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence or amount of surpluses or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this order. The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive. However, the General Motors respondents shall advise the Commission of their intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this order 30 days in advance of reliance thereon.

B. In the event any of the proceedings presently bearing Docket Nos. 9072, 9073 or 9074 result in a final adjudicated or consent order prescribing standards less restrictive (including deferral to state law) than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence or amount of surpluses or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a General Motors respondent's request pursuant to Section 2.51 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order or other relief as necessary and appropriate to conform this order to such less restrictive standards prescribed in the other order(s). The enumeration of subject matter contained in clauses (1), (2) and (3) of this Paragraph is exclusive.

IX. Standard Reporting and Recordkeeping

It is further ordered, That:

A. The General Motors respondents shall maintain complete business records relative to the manner and form of their continuing compliance with this order. These include, but are not limited to, copies of notices sent to financing customers pursuant to Part VI, and records prepared pursuant to Paragraphs V.A–F for each equity dealership. The General Motors repondents shall retain all such records for at least three years and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission.

B. Each of the General Motors respondents shall, within 180 days after service of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order and has implemented the Initial Compliance Report submitted with the Agreement Containing Consent Order.

C. Promptly following service of this order, General Motors shall distribute a copy of this order to its car divisions, GMC Truck and

Coach Division, Motors Holding Division, and Sales Section, unless previously furnished, and GMAC shall distribute a copy of this order to each of its regional managers, unless previously furnished.

D. Each of the General Motors respondents shall notify the Commission at least 30 days prior to any proposed corporate change which may negate any of the obligations of the General Motors respondents arising out of this order. Such changes include dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the discontinuance of General Motors' present program for investing in equity dealerships, and the creation or dissolution of subsidiaries or any other change which may have such effect. No notice need be provided in the event of General Motors' terminating, reducing or acquiring any interest in an equity dealership.

ATTACHMENT A

GENERAL MOTORS ACCEPTANCE CORPORATION CLAIM NOTICE AND RELEASE

(Name, address, city, state)

GMAC Acct. No. ____________

Vehicle ____________

Our records show that this car or truck was retaken by GMAC. We will send you a check for at least $________ . The exact amount may be higher. This depends on how many people answer these letters.

All you have to do to get the money is date and sign the release form below. You must send it back in 60 days. Use the enclosed envelope. We'll send the check in a few months. Here is why we're doing this. We were sued by the Federal Trade Commission (FTC). They said we used an improper method in reselling some vehicles. They also said we should have paid certain customers some money. We denied the charges, but we agreed to make payments to avoid a costly trial. These payments are based on a formula agreed to by the FTC and GMAC. Neither GMAC nor the FTC knows how much you might have gotten except for this settlement. It could have been more, less, or nothing at all.

The release means you give up any claims you may have because of the repossession and resale of your vehicle.

GENERAL MOTORS
ACCEPTANCE CORPORATION
P.O. Box 5290
FDR Station
New York, NY 10022
[Address may be in letterhead]

……

Release

GMAC Acct. No. ____________

Vehicle ____________

I've read the letter above. The car or truck was mine. I'll be paid at least $________ by GMAC if I sign and mail back this release by ____________. This payment is based on an agreement by GMAC and the FTC.

In return, I release all claims and counterclaims (but not any defenses) against GMAC, General Motors or any GM dealer, or their directors or employees, due to the repossession, handling, storage or disposition of my vehicle.

Date: ______________ **(Signed) X** ______________________

(Please Print) ______________________

Name

____

Address

____

City State Zip

IN THE MATTER OF

HOOPER HOLMES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3020. Complaint, June 11, 1980—Decision, June 11, 1980

This consent order requires, among other things, a Basking Ridge, N.J. firm, through its Credit Index Division, a consumer reporting and collection agency, to cease violating federal credit laws by failing to maintain reasonable procedures designed so as to ensure that reports are furnished only for lawful purposes and assure the maximum accuracy of reported information. In its role as a debt collector, the agency is required to include in collection communications prescribed notices informing consumers of their rights under federal credit laws. Consumers requesting information in their credit files must be provided with a copy of this information. Additionally, the agency is required to mail to its subscribers, each year for a five-year period, a prescribed notice informing them of their statutory obligations.

Appearances

For the Commission: *Rachel Wolkin Sesser*.

For the respondent: *Edmund Burke, Steptoe & Johnson*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hooper Holmes, Inc., a corporation, through its Credit Index Division, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Hooper Holmes, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 170 Mt. Airy Road, Basking Ridge, New Jersey.

COUNT I

Alleging violations of the Fair Credit Reporting Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraph One hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 2. Respondent, Hooper Holmes, Inc., operating through its Credit Index Division (hereinafter "Credit Index" or "respondent",) is now and for some time in the past has been, for monetary fees, regularly engaged in the practice of assembling or evaluating consumer credit information for the purpose of furnishing to third parties consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act. Respondent regularly uses a means or facility of interstate commerce for the purpose of preparing and furnishing said consumer reports. Therefore, respondent is a consumer reporting agency, as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondent in the ordinary course and conduct of its business as aforesaid is now, and subsequent to April 25, 1971 has been, engaged in the preparation, offering for sale, sale and distribution of consumer reports, as defined in Section 603(d) of the Fair Credit Reporting Act.

PAR. 4. In the ordinary course and conduct of its business, as aforesaid, respondent utilizes an automated information retrieval system which produces consumer reports containing designated information concerning all individuals having a specified mailing address and the same, or similar, last name to the person inquired upon. In a substantial number of instances, using this system respondent has furnished and is furnishing consumer reports on individuals not involved in the extension of credit or other business transaction. Respondent's system uses no identifiers in addition to the last name and street address to ensure that information concerning separate individuals with the same or similar last name at a specific mailing address are not reported and, therefore, respondent has failed to follow reasonable procedures designed to limit the furnishing of consumer reports for the purposes listed under Section 604 of the Fair Credit Reporting Act and has, therefore, violated Section 607(a) of that Act.

PAR. 5. In the ordinary course and conduct of its business as aforesaid respondent produces consumer reports which it alleges contain information on a single applicant at a specific mailing address using the same or a similar last name and a different first name for the purposes of defrauding the respondent's subscribers. Respondent uses no system of supplementary identifiers to identify with more specificity items which may relate to neighbors, relatives or spouses of the applicant, and in a substantial number of instances, the information items included in the respondent's reports relate not to the applicant but to neighbors, relatives or spouses of the applicant. By and through use of respondent's present information retrieval and reporting system respondent has failed and is failing to follow reasonable procedures designed to assure the maximum possible accuracy of the information concerning the individual about whom the report relates as required by Section 607(b) of the Fair Credit Reporting Act.

PAR. 6. The acts and practices set forth in Paragraphs Four and Five were and are in violation of the Fair Credit Reporting Act, and pursuant to Section 621(a) of that Act, said acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5(a) of the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act in connection with respondent's debt collection activities. The allegations of Paragraphs One, Two and Three are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 7. Respondent is now, and for some time last past has been, engaged in the practice of collecting or attempting to collect debts owed or due or asserted to be owed or due another.

PAR. 8. In the course and conduct of its business as aforesaid, respondent solicits and receives accounts for collection from businesses located in the State of New Jersey and in various other States of the United States, which accounts the respondent seeks thereafter to collect from consumer debtors. In the further course and conduct of its business, respondent transmits through the mail collection messages from its place of business within the State of New Jersey to debtors located in the various States of the United States. The respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 9. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is, in competition in commerce with other corporations, firms and individuals in the attempted collection and collection of consumer debts on behalf of creditors.

PAR. 10. In the course and conduct of its business as aforesaid, and for the purpose of inducing consumers to pay allegedly delinquent accounts, respondent has transmitted and caused to be transmitted, and is now transmitting and causing to be transmitted unsolicited form letters demanding payment which are attached hereto as Exhibits 1 and 2.

Typical and illustrative of the statements and representations made in said forms and printed materials, but not all inclusive, are the following:

1. We have received a report from your creditor on your overdue account. This information is being included in our computerized national delinquent debtor file, and will be reported to any one of the credit granting firms using our service should they order a credit report on you.

2. *Your record will remain in our system for at least five years unless you take action now to settle this account.*

3. Your credit file will show this seriously past due amount with. . .

4. *Enclose this letter, with payment in full today.*

5. Your creditor must notify us of any change in the status of your credit record.

6. You must realize how very important it is to protect a most valuable asset . . . *your credit rating.*

7. Credit Index is a consumer credit reporting agency which maintains a computerized national delinquent debtor file. *Delinquent accounts are included in this file and reported to credit granting organizations using our service.*

8. We have been requested by your creditor to advise you that because of the seriousness of your delinquency, *your credit record may be placed in our national delinquent debtor file.*

9. Our information shows your very serious delinquency with. . .

10. You can still avoid this unnecessary and unpleasant action by paying the total balance of your overdue account. *Enclose this letter with payment in full today,* using the envelope provided.

PAR. 11. By and through the use of said forms and the aforesaid statements and representations set forth therein, respondent, operating by utilizing its position as a consumer reporting agency for debt collection purposes, is acting in an oppressive or coercive manner by intimidating consumers while it is engaged in debt collection activities and has failed to exercise its responsibilities as a consumer reporting agency in a fair and impartial manner. Respondent's use of said forms therefore constitute unfair acts or practices.

PAR. 12. By and through the use of said forms and the aforesaid statements and representations set forth therein, respondent, when utilizing its position as a consumer reporting agency for debt collection purposes, has failed to apprise collection-letter addressess of their statutory rights to obtain disclosure of the information in their files and to dispute inaccurate or incomplete information in respondent's file under the Fair Credit Reporting Act. By and through the use of said forms and the aforesaid statements and representations set forth therein, respondent threatens that if a consumer not act immediately to settle his account, the consumer's record will remain in its system for at least five years and will be reported to any one of the credit-granting firms utilizing its services. Respondent, by emphasizing the importance of one's credit rating and the injury to it that may result from failure to pay the amount alleged due while at the same time failing to apprise collection-letter addresses of their rights under the Fair Credit Reporting Act has failed to disclose material facts to consumers concerning the nature of its responsibilities as a consumer reporting agency engaged in debt collection activities. Respondent thereby, has engaged in unfair acts and practices.

PAR. 13. The use by respondent of the aforementioned statements, representations and forms and the failure to apprise collection-letter addressees of their rights under the Fair Credit Reporting Act has had, and now has, the tendency and capacity to coerce the recipients of these forms into the payment of accounts to respondent or its subscribers without exercising their statutory right to dispute debts they do not owe or have an offsetting claim or defense to paying.

PAR. 14. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public, and constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT III

Alleging violation of Section 5 of the Federal Trade Commission Act in connection with respondent's consumer reporting activities. The allegations of Paragraphs One, Two and Three are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 15. Respondents in the ordinary course and conduct of its business as a consumer reporting agency includes in its consumer reports a "Summary Item" which indicates the aggregate number of items of derogatory information in respondent's file at the mailing address of the person inquired on and which contains the derogatory information received by respondent in a form not identifiable to an individual consumer. In a substantial number of instances information in the Summary Item is used by creditors to deny credit to the individuals inquired on based on the paying habits of other individuals who have or sometime in the past had the same mailing address. Since the Summary Item results in the exclusion of some consumers from credit transactions based on the paying habits of prior residents, neighbors and relatives, its use by respondent constitutes an unfair act or practice.

PAR. 16. Respondent in the ordinary course and conduct of its business as a consumer reporting agency includes in its consumer reports a "Activity Summary Item" which records the number of creditor inquiries made concerning persons with names which are not the same or similar to the person inquired upon but who have the same mailing address specified for the person inquired on during the last six months. In a substantial number of instances information in the Activity Summary Item is used by creditors to deny credit to individuals inquired on based on information concerning other individuals who have, or sometime in the past had, the same mailing address. Since the Activity Summary Item results in the exclusion of some consumers from credit transactions based on information concerning prior residents, neighbors and relatives, its use by respondent constitutes an unfair act or practice.

PAR. 17. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public, and constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended and the Fair Credit Reporting Act, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Hooper Holmes Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 170 Mt. Airy Road, in the City of Basking Ridge, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER I

It is ordered, That respondent, Hooper Holmes, Inc., a corporation, through its Credit Index Division, its successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection, assembling or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. Law No. 91-508, 15 U.S.C. 1681, *et seq.*), shall forthwith cease and desist from:

(1) Failing to maintain reasonable procedures designed to limit the furnishing of consumer reports for the purposes listed under Secton 604 of the Fair Credit Reporting Act.

(2) Failing, when preparing a consumer report, to follow reasonable procedures designed to assure maximum possible accuracy of the information concerning the individual about whom the report relates as required by Section 607(b) of the Fair Credit Reporting Act.

(3)(a) Providing reports containing information concerning accounts of individuals having inconsistent courtesy titles, different first names, different last names, different mailing addresses or inconsistent suffixes from the creditor's inquiry unless the respondent can show on a statistically valid basis that its reporting system is reasonably designed to retrieve and report such information only in instances in which the individual consumer inquired on is using different first names and identical or similar last names as a means of deceiving respondent or its subscribers. Respondent shall provide the Commission with copies of any such statistical studies not less than 90 days prior to implementing changes to its system based on such studies and if requested by the Commission will delay implementation of changes an additional 120 days.

(3)(b) For the purposes of this order:

(i) The last name of the individual reported upon shall not be considered different from the last name of the inquiry if;

(A) the last name contains five or more letters and all but two of the letters are identical to the letters of the last name of the inquiry; or,

(B) the last name has four letters and all but one are identical to the letters of the last name of the inquiry; and

(C) the address used in the inquiry under either A or B is a full street address (specific house or building number plus street name) or post office box number, and does not contain an inconsistent apartment number, a rural route number, general delivery or similar mailing address, and

(D) the inquiry contains a full first name, not initials, which, subject to the tolerances provided in (A) and (B) for last names, is not inconsistent with the first name or initial on the report.

(ii) A first initial which is not inconsistent with the individual's first name shall not be considered a different first name, if respondent:

(A) instructs its subscribers to use the full first name, whenever available, in making inquiries or submitting information to the file; and

(B) the address used in the inquiry is a full street address (specific house or building number plus street name) or post office box number, and does not contain an inconsistent apartment number, general delivery, rural route number or similar mailing address; and

(C) the inquiry is not made with an inconsistent courtesy title or suffix.

(iii) A first name which is a commonly accepted nickname for the first name of the individual inquired upon shall not be considered a different first name.

(4) Including in any consumer report a "Summary Item", "Activity Summary Item" or other information concerning the creditworthiness of other individuals with the same mailing address as, but with a different last name from, the individual inquired on, provided that the above restriction on Summary Items and Activity Summary Items does not apply to summary or activity reports generated by respondent internally for use by respondent identifying credit applications for which respondent will conduct additional investigation but respondent shall not reject, recommend rejection or otherwise directly or indirectly issue a negative report based solely on a summary or activity item, or on the applicant's failure to respond to a request for additional information from respondent.

ORDER II

It is ordered, That respondent, Hooper Holmes, Inc., a corporation, through its Credit Index Division, its successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of consumer debts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

Failing to disclose to consumers, in any communication relating to debt collection activities, their rights under the Fair Credit Reporting Act and Fair Debt Collection Practices Act as set forth in the exact facsimile of Exhibit A attached hereto.

A. *It is further ordered,* That respondent, each year for a five year period, mail to each subscriber the following notice in not less than 12 point boldface type:

IMPORTANT NOTICE

Credit Index is a consumer reporting agency subject to the provisions of the Federal Fair Credit Reporting Act. As a user of these reports you also are subject to the requirements of this law. If you use any information reported by Credit Index in whole or in part in your decision to deny credit, employment or insurance, you must notify the rejected applicant of that fact and provide our name, street address and phone number. Your failure to do so would violate Federal law.

[Insert Name, street address and phone number.]

Additionally, Credit Index, upon request and proper identification will disclose all information in its file to consumers by mail and we would appreciate your including this information in your notice also.

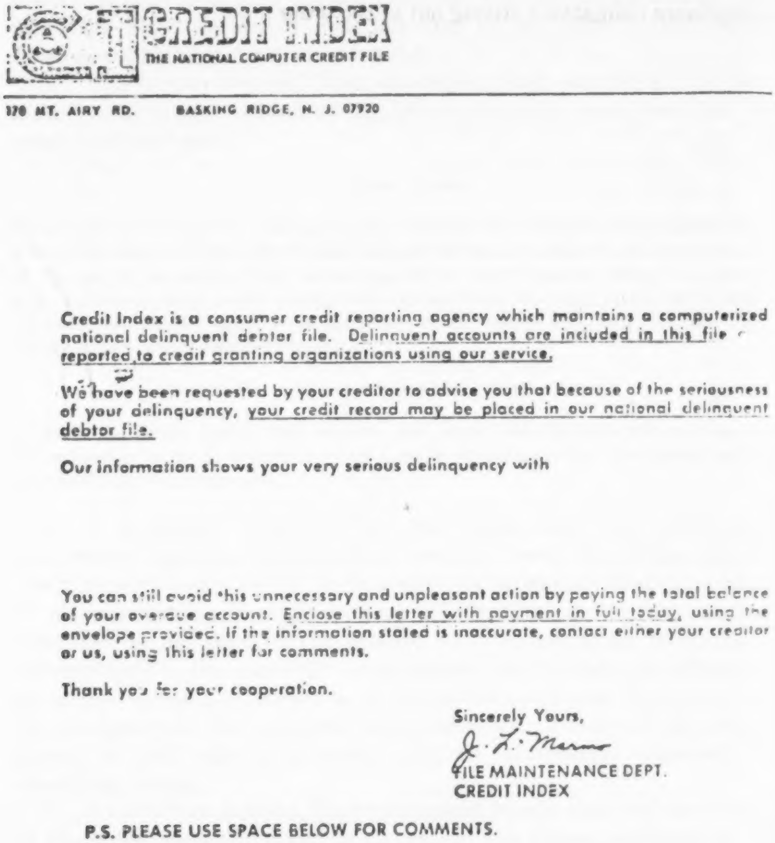
B. *It is further ordered,* That respondent make the disclosures required by Sections 609 and 610 of the Fair Credit Reporting Act for credit reports issued by its Credit Index subsidiary, by mailing a copy of all information (except medical information) in its files on the consumer at the time of the request (or a transcription of all such information) to the consumer upon request and proper identification or, in lieu thereof, in person or by telephone upon specific request by the consumer. If the consumer is provided with a copy of the actual report, he shall also be provided with all information necessary to decode the report.

C. *It is further ordered,* That respondent herein shall deliver a copy of this order cease and desist to all present and future personnel of its Credit Index division, including employees and representatives, engaged in the preparation of reports including consumer reports, and engaged in the disclosure and reinvestigation of information in said reports, and that respondent secure a signed statement acknowledging receipt of said order from each person.

D. *It is further ordered,* That respondent shall provide each consumer who requests disclosure of information in his or her file in accordance with the Fair Credit Reporting Act, with an exact facsimile of Exhibit B attached hereto.

E. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

EXHIBIT 1



CREDIT INDEX
THE NATIONAL COMPUTER CREDIT FILE

370 MT. AIRY RD. BASKING RIDGE, N. J. 07920

Credit Index is a consumer credit reporting agency which maintains a computerized national delinquent debtor file. Delinquent accounts are included in this file reported to credit granting organizations using our service.

We have been requested by your creditor to advise you that because of the seriousness of your delinquency, your credit record may be placed in our national delinquent debtor file.

Our information shows your very serious delinquency with

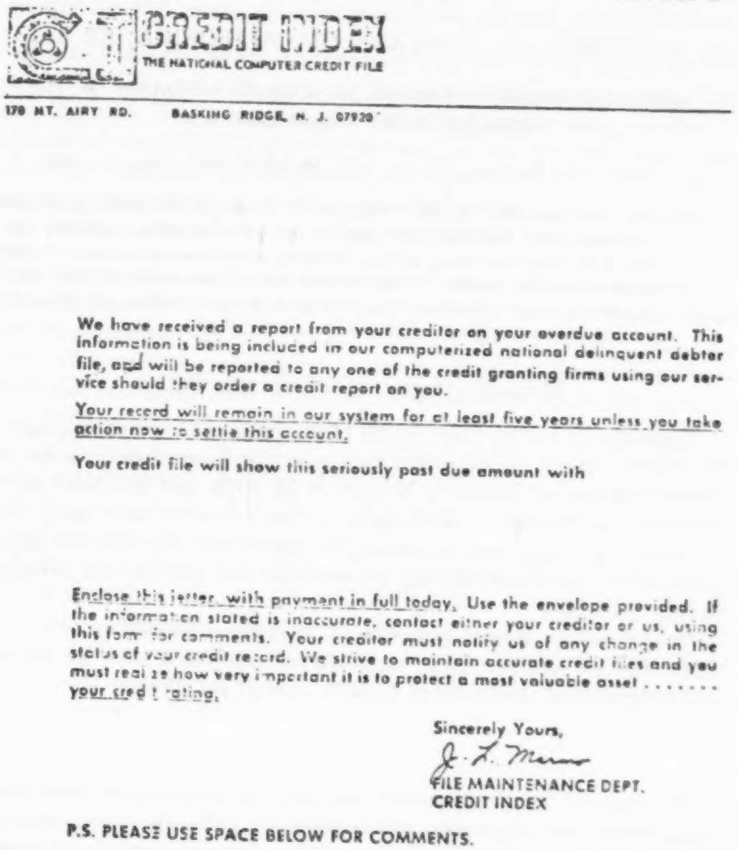
You can still avoid this unnecessary and unpleasant action by paying the total balance of your overdue account. Enclose this letter with payment in full today, using the envelope provided. If the information stated is inaccurate, contact either your creditor or us, using this letter for comments.

Thank you for your cooperation.

Sincerely Yours,
J. L. Marmo
FILE MAINTENANCE DEPT.
CREDIT INDEX

P.S. PLEASE USE SPACE BELOW FOR COMMENTS.

EXHIBIT 2



CREDIT INDEX
THE NATIONAL COMPUTER CREDIT FILE

170 MT. AIRY RD. BASKING RIDGE, N. J. 07920

We have received a report from your creditor on your overdue account. This information is being included in our computerized national delinquent debtor file, and will be reported to any one of the credit granting firms using our service should they order a credit report on you.

Your record will remain in our system for at least five years unless you take action now to settle this account.

Your credit file will show this seriously past due amount with

Enclose this letter, with payment in full today. Use the envelope provided. If the information stated is inaccurate, contact either your creditor or us, using this form for comments. Your creditor must notify us of any change in the status of your credit record. We strive to maintain accurate credit files and you must realize how very important it is to protect a most valuable asset .... your credit rating.

Sincerely Yours,

J. L.

FILE MAINTENANCE DEPT.
CREDIT INDEX

P.S. PLEASE USE SPACE BELOW FOR COMMENTS.

IN THE MATTER OF

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8827. Decision, Nov. 26, 1974—Modified Order, June 16, 1980

This order modifies a Nov. 26, 1974 order, 84 F.T.C. 1401, 40 FR 13488, against a San Francisco, Calif. distributor of gasoline and other petroleum products and its New York City advertising agency, requiring compliance with a court of appeals decision that the "blanket" order provision as to all advertising of "any" product was wholly unwarranted based on three misleading advertisements. The order is modified to cover only advertising of its additive, F-310.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Ninth Circuit petitions for review of the Commission's cease and desist order issued herein on November 26, 1974; and the Court having rendered its decision modifying the Commission's order and, as so modified, affirming and enforcing the order; and the time for filing a petition for certiorari having expired and no petition for certiorari having been filed:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

I.

It is ordered, That respondent Standard Oil Company of California, a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F-310, forthwith cease and desist from:

1. Representing directly or by implication that such product:

(a) Will produce or result in motor vehicle exhaust which is pollution free or generally pollution free; or

(b) Will eliminate or reduce air pollution caused by motor vehicles; or

(c) Will eliminate or reduce emissions from all or any number or group of motor vehicles in which it is used;

or that:

(d) Such gasoline additive product has any other quality, performance ability or other characteristic; or

(e) Tests, demonstrations, research or experiments have been conducted which prove or substantiate any of said representations;

Unless and only to the extent that each and every such representation is true and has been fully and completely substantiated by competent scientific tests. The results of said tests, the original data collected in the course thereof and a detailed description of how said tests were performed shall be kept available in written form for at least three years following the final use of the representation.

2. Representing directly or by implication that:

(a) Automotive exhaust has certain observable or measurable characteristics in all or any number or group of motor vehicles when such is not the fact; or

(b) Any machines, measuring devices or technical instruments have particular characteristics or capacities when such is not the fact; or

(c) Such product has any effectiveness in reducing air pollution or any air pollutant or air pollutants without at the same time, in the same advertisement or other form of communication, conspicuously disclosing that not all of the harmful pollutants in automotive exhaust are affected by said product; or

(d) Such product will reduce any emissions of pollutants from automobile exhaust by any percentage or numerical quantity unless in connection therewith there is a clear, accurate and conspicuous disclosure of the type of vehicle which can expect to achieve reductions of such magnitude and the approximate percentage of such vehicles in the general car population.

II.

It is ordered, That respondent Standard Oil Company of California, a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F-310, forthwith cease and desist directly or indirectly from:

1. Advertising by or through the use of or in conjunction with any test, experiment, or demonstration, or the result thereof, or any other information or evidence that appears or purports to confirm or prove, or is offered as confirmation, evidence, or proof of any fact, product characteristic or the truth of any representation, which does not accurately demonstrate, prove, or confirm such fact, product characteristic, or representation.

2. Using any pictorial or other visual means of communication with

or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication.

3. Misrepresenting in any manner or by any means any characteristic, property, quality, or the result of use of such gasoline additive product.

III.

It is ordered, That respondent Batten, Barton, Durstine & Osborn, Inc., a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of the additive F-310, forthwith cease and desist from:

1. Representing directly or by implication that such product:

(a) Will produce or result in motor vehicle exhaust which is pollution free or generally pollution free; or

(b) Will eliminate or reduce air pollution caused by motor vehicles; or

(c) Will eliminate or reduce emissions from all or any number or group of motor vehicles in which it is used;

or that:

(d) Such gasoline additive product has any other quality, performance ability or other characteristic; or

(e) Tests, demonstrations, research or experiments have been conducted which prove or substantiate any of said representations;

Unless and only to the extent that respondent has a reasonable basis for such representation based upon competent scientific tests by it or its client. The results of said tests and the data collected in the course thereof relied upon by respondent shall be kept available in written form for at least three years following the final use of the representation.

2. Representing directly or by implication that:

(a) Automotive exhaust has certain observable or measurable characteristics in all or any number or group of motor vehicle when such is not the fact; or

(b) Any machines, measuring devices or technical instruments have particular characteristics or capacities when such is not the fact; or

(c) Such product has any effectiveness in reducing air pollution or any air pollutant or air pollutants without at the same time, in the same advertisement or other form of communication, conspicuously disclosing that not all of the harmful pollutants in automotive exhaust are affected by said product; or

(d) Such product will reduce any emissions of pollutants from automobile exhaust by any percentage or numerical quantity unless in connection therewith there is a clear, accurate and conspicuous disclosure of the type of vehicle which can expect to achieve reductions of such magnitude and the approximate percentage of such vehicles in the general car population.

IV.

It is ordered, That respondent Batten, Barton, Durstine & Osborn, Inc., a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F–310, forthwith cease and desist directly or indirectly from:

1. Advertising by or through the use of or in conjunction with any test, experiment, or demonstration, or the result thereof, or any other information or evidence that appears or purports to confirm or prove or is offered as confirmation, evidence or proof of any fact, product characteristic, or of the truth of any representation which does not accurately demonstrate, prove, or confirm such fact, product characteristic, or representation unless the respondent can establish it neither knew, nor had reason to know, nor upon reasonable inquiry could have known that such was the case.
2. Using any pictorial or other visual means of communication with or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication unless the respondent can establish it neither knew nor had reason to know nor upon reasonable inquiry could have known the true facts.
3. Misrepresenting in any manner or by any means any characteristic, property, quality, or the result of the use of such gasoline additive product unless the respondent can establish it neither knew nor had reason to know nor upon reasonable inquiry could have known that such representations are false.

It is further ordered, That respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents herein shall notify the

Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service of the order upon them, file with the Commission a written report, signed by the respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

JORDAN-SIMNER, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3022. Complaint, June 19, 1980—Decision, June 19, 1980

This consent order requires, among other things, a Ft. Lauderdale, Florida manufacturer of pharmaceutical products to cease making any misrepresentations of the efficacy or novel performance characteristics of its vaginal contraceptive suppository products. The order specifically prohibits any exaggerated efficacy claims for the products such as "highly" or "extremely" effective. Additionally, respondent is prohibited from making claims of efficacy without a reasonable basis consisting of a consistent body of valid and scientific evidence.

Appearances

For the Commission: *Susan Lerner.*

For the respondents: *Raymond D. McMurray, Hamel, Park, McCabe & Saunders*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Jordan-Simner, Inc., a corporation, and Robert Cohen, individually and as an officer of said corporation (hereinafter "respondents"), have violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Jordan-Simner, Inc. is a Florida corporation with its principal place of business at 6852 N.W. 12th Ave., Ft. Lauderdale, Florida.

Respondent Robert Cohen is an officer of said corporation. He formulates, directs and controls its acts and practices, including the acts and practices hereafter set forth. His business address is the same as said corporation.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

(1) A "vaginal contraceptive suppository" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

(2) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

(3) "Commerce" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondents engage in the manufacturing, advertising, offering for sale and sale of pharmaceutical products, including a vaginal contraceptive suppository product named "S'Positive", a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. Respondents cause their products when sold, to be shipped and distributed from their place of business to purchasers located in various other States of the United States and the District of Columbia. Respondents maintain a substantial course of trade in all their products, including their product S'Positive, in or affecting commerce.

PAR. 5. In the course and conduct of their business respondents disseminate or cause to be disseminated certain advertisements concerning S'Positive (1) by United States mails, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of S'Positive, or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of S'Positive in or having an effect upon commerce.

PAR. 6. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the advertisements identified as Attachments 1 and 2.

PAR. 7. Through the use of such advertisements, and others not specifically set forth herein, respondents represent, directly or by implication, that:

1. S'Positive has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").
2. S'Positive has novel contraceptive performance characteristics.

PAR. 8. In truth and in fact:

1. S'Positive's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.

2. S'Positive does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertisements and representations referred to in Paragraphs Six and Seven are false, deceptive or misleading.

PAR. 9. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondents represent, directly or by implication, that:

1. S'Positive has an extremely high use effectiveness.
2. S'Positive has novel contraceptive performance characteristics.
3. S'Positive has undergone years of successful medical or consumer testing.

PAR. 10. At the time respondents made the representations alleged in Paragraph Nine, respondents had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive acts or practices in or affecting commerce.

PAR. 11. Furthermore, respondents market or advertise S'Positive without disclosing to the purchasing public through their advertising that:

1. For best protection against pregnancy, it is essential that one follow instructions.
2. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
3. Some S'Positive users experience irritation.
4. S'Positive requires a waiting period of fifteen minutes before intercourse to ensure effectiveness.
5. S'Positive is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 12. The facts described in Paragraph Eleven are material with respect to the consequences which may result from use of S'Positive as a contraceptive under such conditions as are customary or usual. Respondents' failure to disclose these material facts renders the advertisements referred to in Paragraphs Five and Six false, deceptive or misleading.

PAR. 13. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondents, directly or by implication, favorably compare some characteristics of S'Positive to

best copy available

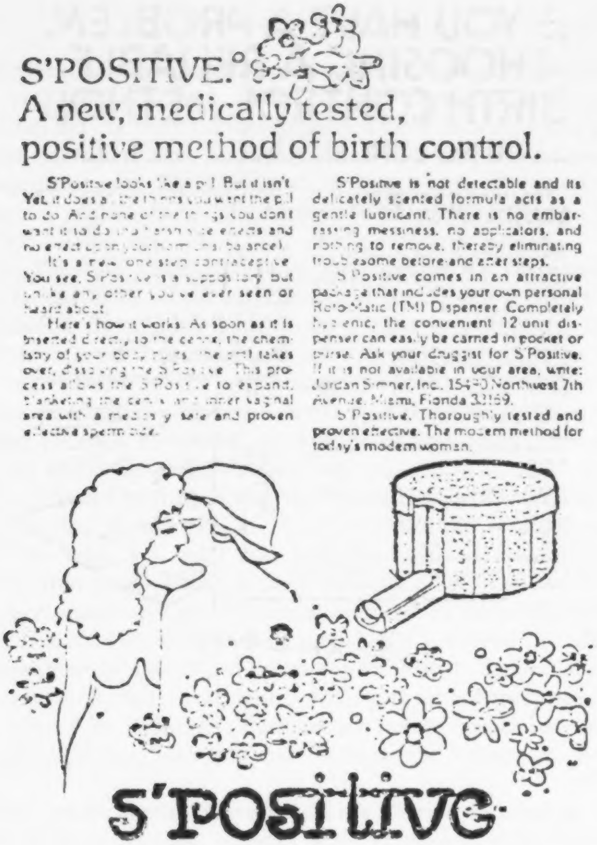
the pill or the IUD and represent in the same advertisement that S'Positive has an extremely high use effectiveness. Favorable comparison of S'Positive to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that S'Positive's use effectiveness is equal to that of the pill or IUD. Respondents fail to disclose the fact that S'Positive has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 14. The fact described in Paragraph Thirteen is material in light of the comparative representations made in respondents' advertisements. Respondents' failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Five and Six false, misleading or unfair.

PAR. 15. In the course and conduct of its business, and at all times mentioned herein, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of drugs or contraceptive products of the same general kind and nature as advertised or sold by respondents.

PAR. 16. The use by respondents of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices, and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' products or services by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.



S'POSITIVE.

A new, medically tested, positive method of birth control.

S'Positive looks like a pill. But it isn't. Yet, it does all the things you want the pill to do. And none of the things you don't want it to do (no harsh side effects and no effect upon your hormonal balance).

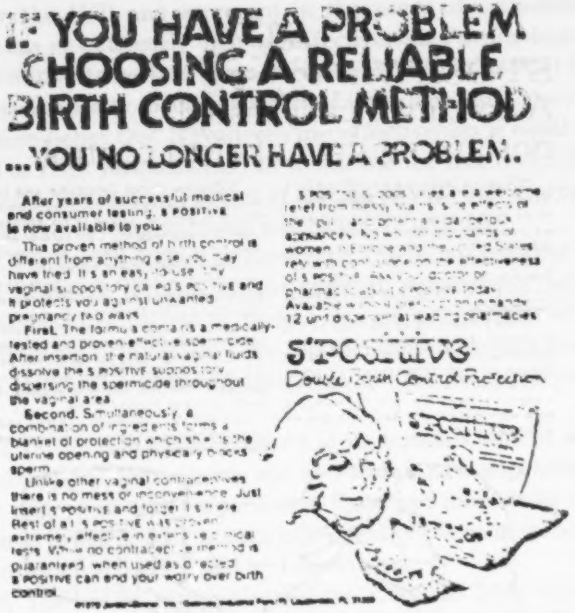
It's a new, one step contraceptive. You see, S'Positive is a suppository but unlike any other you've ever seen or heard about.

Here's how it works. As soon as it is inserted directly to the cervix, the chemistry of your body fluids (the pH) takes over, dissolving the S'Positive. This process allows the S'Positive to expand, blanketing the cervix and inner vaginal area with a medically safe and proven effective spermicide.

S'Positive is not detectable and its delicately scented formula acts as a gentle lubricant. There is no embarrassing messiness, no applicators, and nothing to remove, thereby eliminating troublesome before-and-after steps.

S'Positive comes in an attractive package that includes your own personal Roto-Matic (TM) Dispenser. Completely hygienic, the convenient 12 unit dispenser can easily be carried in pocket or purse. Ask your druggist for S'Positive. If it is not available in your area, write: Jordan Simner, Inc., 15490 Northwest 7th Avenue, Miami, Florida 33169.

S'Positive. Thoroughly tested and proven effective. The modern method for today's modern woman.



IF YOU HAVE A PROBLEM CHOOSING A RELIABLE BIRTH CONTROL METHOD

...YOU NO LONGER HAVE A PROBLEM.

After years of successful medical and consumer testing, S POSITIVE is now available to you.

This proven method of birth control is different from anything else you may have tried. It's an easy-to-use, tiny vaginal suppository called S POSITIVE and it protects you against unwanted pregnancy two ways.

First. The formula contains a medically-tested and proven-effective spermicide. After insertion, the natural vaginal fluids dissolve the S POSITIVE suppository dispersing the spermicide throughout the vaginal area.

Second. Simultaneously, a combination of ingredients forms a blanket of protection which shields the uterine opening and physically blocks sperm.

Unlike other vaginal contraceptives there is no mess or inconvenience. Just insert S POSITIVE and forget it's there. Best of all, S POSITIVE was proven extremely effective in extensive clinical tests. While no contraceptive method is guaranteed, when used as directed S POSITIVE can end your worry over birth control.

S POSITIVE suppositories are a welcome relief from messy foams, side effects of the "pill" and potentially dangerous appliances. Now with thousands of women in Europe and the United States rely with confidence on the effectiveness of S POSITIVE. Ask your doctor or pharmacist about S POSITIVE today. Available without prescription in handy 12 unit dispenser at leading pharmacies.

S'POSITIVE

Double Birth Control Protection

[illegible]

120

Glamour 2-79

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jursidictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules; now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Jordan-Simner, Inc. is a Florida corporation with its principal place of business at 6852 N.W. 12th Ave., Fort Lauderdale, Florida.

Respondent Robert Cohen is an officer of said corporation. He formulates, directs and controls its acts and practices, including the acts and practices hereafter set forth. His business address is the same as said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

This order applies to respondent Jordan-Simner, Inc., its successors, assigns, officers, agents and employees, and to respondent Robert Cohen, individually and as an officer of the corporation, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with respondents' advertising, offering for sale, sale or distribution of S'Positive or any OTC (over the counter) contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this order are not intended to set a standard for drug products other than OTC contraceptives.

For purposes of this order, the following definitions shall apply:

1) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "S'Positive" means the vaginal contraceptive suppository product marketed under the tradename S'Positive, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

3) "Advertisement" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert), whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert) catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; *provided, however*, that the term advertisement does not include material which solely refers to the product without making any claims for the product.

4) "Product or use characteristic" includes but is not limited to efficacy, safety or convenience.

I.

It is ordered, That each respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding S'Positive which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product.

C. Representing, directly or by implication, that S'Positive has novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Making any representation, directly or by implication, concerning the effectiveness or the testing of any OTC contraceptive product unless respondents have a reasonable basis for such representations consisting of a consistent body of valid and reliable scientific evidence; *provided, however,* that respondent may represent that S'Positive is effective or reliable or make other effectiveness claims as permitted by this order (for example, "S'Positive provides reliable protection against pregnancy.").

II.

It is further ordered, That each respondent make the following affirmative disclosures in any consumer (lay) print advertisement for S'Positive:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, ask your doctor if you can use S'Positive.

C. Some S'Positive users experience irritation in using the product.

D. It is essential that you insert S'Positive at least fifteen minutes before intercourse.

E. S'Positive is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondents may modify the words "fifteen minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in typeface at least as large as the typeface of the major portion of the text of the ad copy. Disclosures D and E shall be separate and distinguishable from the main body of the advertisement for a period of 24 months following the date of service of this order or 27 months from the date of signing of this order, whichever expires earlier.

III.

It is further ordered, That respondents make the following affirmative disclosure in any consumer (lay) advertisement for S'Positive in which any product or use characteristic of S'Positive is compared, directly or by implication, to any product or use characteristic of oral contraceptives or intra-uterine devices:

S'Positive is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

S'Positive is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of the Disclosure II.E. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the ad specified for Disclosure II.E.

IV.

It is further ordered, That each respondent make the following disclosures in any consumer (lay) TV advertisements for S'Positive:

A. **Follow directions exactly, including the fifteen minute waiting period.**

B. **Approximately as effective as contraceptives foams.**

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however*, that if respondents have a reasonable basis, consisting of valid scientific test(s) or study(ies), respondents may modify the words "fifteen minutes" in Disclosure A consistent with such reasonable basis.

V.

It is further ordered, That respondents make the following disclosure in any consumer (lay) radio advertisements for S'Positive:

S'Positive's effectiveness is approximately equal to contraceptive foams.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI.

It is further ordered, That respondents shall make the following disclosures in ethical (professional) advertisements for S'Positive:

A. Irritation accompanies use of the product in some instances.

B. S'Positive must be inserted according to product instructions and at least fifteen minutes before intercourse.

C. S'Positive is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

S'Positive is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same or substantially similar to the language set forth above; *provided however*, that if respondents have a reasonable basis, consisting of valid scientific test(s) or study(ies), respondents may modify the words "fifteen minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the ad copy.

If respondents have a reasonable basis, consisting of a consistent body of valid and reliable scientific evidence, for any change in Disclosures contained in Paragraphs II.A, B, C or E, III, IV.B, V, and VI.A or C above, respondents may petition the Commission for appropriate modification of this order.

VII.

It is further ordered, That each respondent cease and desist from:

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mails or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of S'Positive or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this order.

VIII.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, mail under separate cover a copy of either this order or the Federal Trade Commission's news release relating to this Order to:

A. Every physician or health care professional to whom respondent previously sent any promotional materials regarding S'Positive.

B. Every pharmacist who has sold S'Positive to the public within the two year period prior to the date of service of this order.

An affidavit of mailing shall be sworn to by an official of the corporate respondent verifying said mailing has been completed.

IX.

It is further ordered, That respondents maintain complete business records relative to the manner and form of their compliance with this order. Such records shall include but not be limited to, copies of and dissemination schedules for all advertisements or documents which substantiate or contradict any claim made in advertising, promoting or selling the product. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertising. Upon thirty (30) days' notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

X.

It is further ordered, That respondents forthwith deliver a copy of this order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of S'Positive or in any aspect of the preparation, creation or placing of advertising for S'Positive on behalf of respondents. A statement acknowledging receipt of this order shall be obtained in each case.

XI.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in a corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporations which may affect compliance obligations arising out of this order.

XII.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale or advertising of OTC contraceptive products or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale or advertising of OTC contraceptive products. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

XIII.

It is further ordered, That respondents shall, within sixty (60) days after service upon it of this order, file with the Commission a report setting forth in detail the manner and form in which it has complied with this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3023. Complaint, June 19, 1980—Decision, June 19, 1980

This consent order requires, among other things, a New York City manufacturer of pharmaceutical products to cease making any misrepresentations of the efficacy or novel performance characteristics of its vaginal contraceptive suppository products. The order specifically prohibits any exaggerated efficacy claims for the products such as "highly" or "extremely" effective. Additionally, respondent is prohibited from making claims of efficacy without a reasonable basis consisting of a consistent body of valid and scientific evidence. Respondent is also required to distribute an information pamphlet discussing the advantages and disadvantages of various over-the-counter contraceptive methods as well as setting forth specifically required affirmative disclosures.

Appearances

For the Commission: *Barry E. Barnes, Susan Lerner* and *Rachel Wolkin Sesser.*

For the respondent: *William W. Vodra, Arnold & Porter, Charles F. Hagen* and *William P. Woods,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Home Products Corporation, a corporation, (hereinafter "respondent") has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. American Home Products Corporation is a Delaware corporation with its principal place of business at 685 Third Ave., New York, New York.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

1) A "vaginal contraceptive suppository" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

2) "Use effectiveness" means that level of effectiveness which is

obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

3) "Commerce" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent American Home Products Corporation engages in the manufacturing, advertising, offering for sale and sale of pharmaceutical products, including a vaginal contraceptive suppository product named "Semicid", a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. Respondent American Home Products Corporation causes its products when sold, to be shipped and distributed from its places of business to purchasers located in various other States of the United States, the District of Columbia and Puerto Rico. Respondent American Home Products Corporation maintains a substantial course of trade in all its products, including its product Semicid, in or affecting commerce.

PAR. 5. In the course and conduct of its business respondent disseminates or causes to be disseminated certain advertisements concerning Semicid (1) by United States mails, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio and television broadcasts of interstate transmission, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Semicid, or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Semicid in or having an effect upon commerce.

PAR. 6. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondent's advertisements, but not all inclusive thereof, are the advertisements identified as Attachments 1 through 4.

PAR. 7. Through the use of such advertisements, and others not specifically set forth herein, respondent represents, directly or by implication, that:

1. Semicid has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").
2. Semicid has novel contraceptive performance characteristics.

PAR. 8. In truth and in fact:

1. Semicid's use effectiveness is approximately that of other

vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.

2. Semicid does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertisements and representations referred to in Paragraphs Six and Seven are false, deceptive or misleading.

PAR. 9. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondent represents, directly or by implication, that:

1. Semicid has an extremely high use effectiveness.
2. Semicid has novel contraceptive performance characteristics.
3. Semicid has been scientifically or medically proven to have an extremely high use effectiveness.

PAR. 10. At the time respondent made the representations alleged in Paragraph Nine, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 11. Furthermore, respondent markets or advertises Semicid without disclosing to the purchasing public through its advertising that:

1. For best protection against pregnancy, it is essential that one follow instructions.
2. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
3. Some Semicid users experience irritation.
4. Semicid requires a waiting period of fifteen minutes before intercourse to ensure effectiveness.
5. Semicid is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 12. The facts described in Paragraph Eleven are material with respect to the consequences which may result from use of Semicid as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertisements referred to in Paragraphs Five and Six false, deceptive or misleading.

PAR. 13. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondent, directly or by implication, favorably compares some characteristics of Semicid to the pill or the IUD and represents in the same advertisement that Semicid has an extremely high use effectiveness. Favorable comparison of Semicid to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Semicid's use effectiveness is equal to that of the pill or IUD. Respondent fails to disclose the fact that Semicid has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

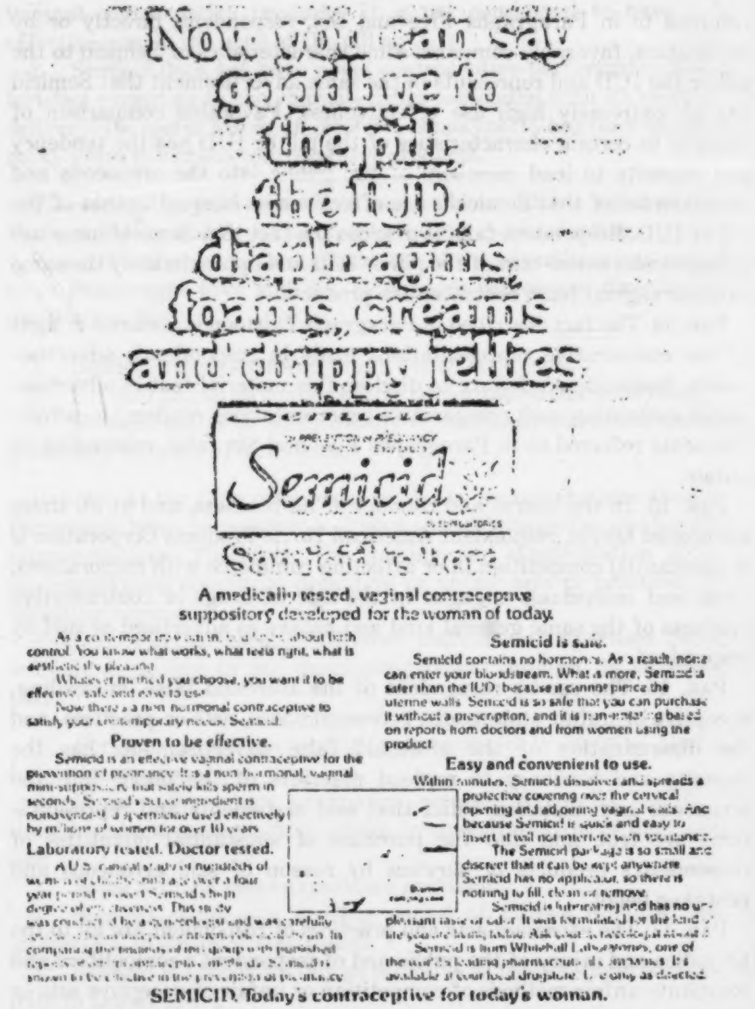
PAR. 14. The fact described in Paragraph Thirteen is material in light of the comparative representations made in respondent's advertisements. Respondent's failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Five and Six false, misleading or unfair.

PAR. 15. In the course and conduct of its business, and at all times mentioned herein, respondent American Home Products Corporation is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of drugs or contraceptive products of the same general kind and nature as advertised or sold by respondent.

PAR. 16. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices, and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.



Now you can say goodbye to the pill, the IUD, diaphragms, foams, creams and drippy jellies.

Semicid is here.

For prevention of pregnancy
Semicid
10 suppositories

A medically tested, vaginal contraceptive suppository developed for the woman of today.

As a contemporary woman, you know about birth control. You know what works, what feels right, what is aesthetic, the pleasure.

Whatever method you choose, you want it to be effective, safe and easy to use.

Now there is a non-hormonal contraceptive to satisfy your contemporary needs. Semicid.

Proven to be effective.

Semicid is an effective vaginal contraceptive for the prevention of pregnancy. It is a non-hormonal, vaginal mini-suppository that safely kills sperm in seconds. Semicid's active ingredient is nonoxynol-9, a spermicide used effectively by millions of women for over 10 years.

Laboratory tested. Doctor tested.

A U.S. clinical study of hundreds of women of childbearing age over a four year period proved Semicid's high degree of effectiveness. This study was conducted by a gynecologist and was carefully [illegible]. In comparing the findings of this group with published reports of other contraceptive methods, Semicid is shown to be effective in the prevention of pregnancy.

Semicid is safe.

Semicid contains no hormones. As a result, none can enter your bloodstream. What is more, Semicid is safer than the IUD, because it cannot pierce the uterine walls. Semicid is so safe that you can purchase it without a prescription, and it is non-irritating based on reports from doctors and from women using the product.

Easy and convenient to use.

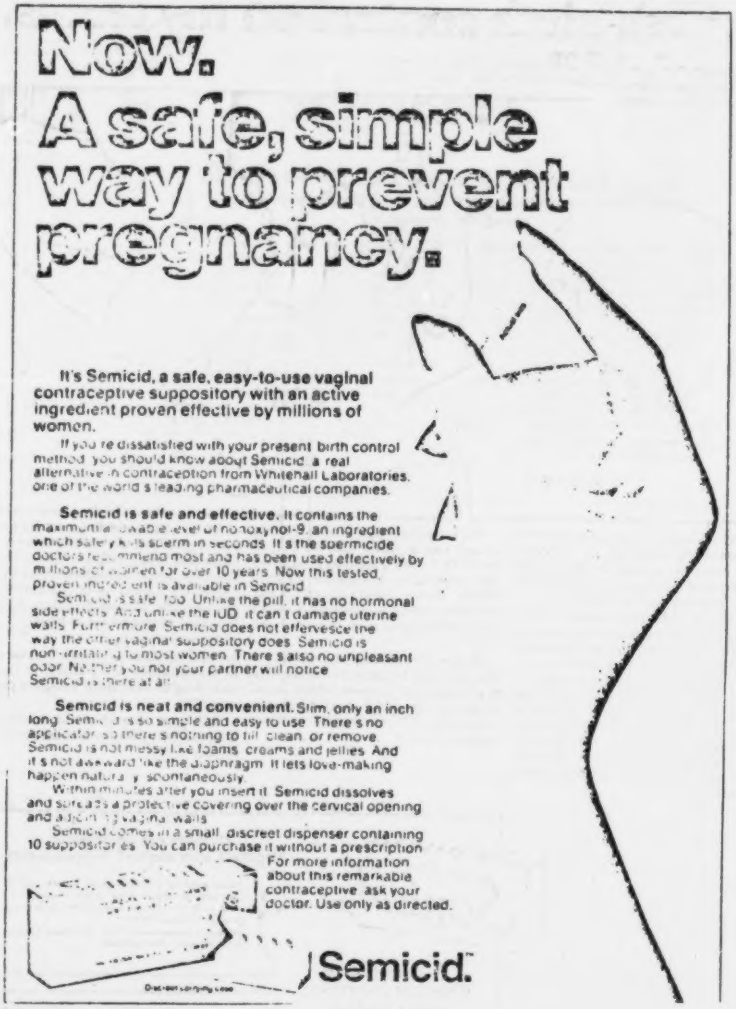
Within minutes, Semicid dissolves and spreads a protective covering over the cervical opening and adjoining vaginal walls. And because Semicid is quick and easy to insert, it will not interfere with spontaneity.

The Semicid package is so small and discreet that it can be kept anywhere. Semicid has no applicator, so there is nothing to fill, clean or remove.

Semicid is lubricating and has no unpleasant taste or odor. It was formulated for the kind of life you are living today. [illegible]

Semicid is from Whitehall Laboratories, one of the world's leading pharmaceutical companies. It's available at your local drugstore. Use only as directed.

SEMICID. Today's contraceptive for today's woman.



Now.
A safe, simple way to prevent pregnancy.

It's Semicid, a safe, easy-to-use vaginal contraceptive suppository with an active ingredient proven effective by millions of women.

If you're dissatisfied with your present birth control method, you should know about Semicid, a real alternative in contraception from Whitehall Laboratories, one of the world's leading pharmaceutical companies.

Semicid is safe and effective. It contains the maximum allowable level of nonoxynol-9, an ingredient which safely kills sperm in seconds. It's the spermicide doctors recommend most and has been used effectively by millions of women for over 10 years. Now this tested, proven ingredient is available in Semicid.

Semicid is safe, too. Unlike the pill, it has no hormonal side effects. And unlike the IUD, it can't damage uterine walls. Furthermore, Semicid does not effervesce the way the other vaginal suppository does. Semicid is non-irritating to most women. There's also no unpleasant odor. Neither you nor your partner will notice Semicid is there at all.

Semicid is neat and convenient. Slim, only an inch long, Semicid is so simple and easy to use. There's no applicator, so there's nothing to fill, clean, or remove. Semicid is not messy like foams, creams and jellies. And it's not awkward like the diaphragm. It lets love-making happen naturally, spontaneously.

Within minutes after you insert it, Semicid dissolves and spreads a protective covering over the cervical opening and adjoining vaginal walls.

Semicid comes in a small, discreet dispenser containing 10 suppositories. You can purchase it without a prescription.

For more information about this remarkable contraceptive, ask your doctor. Use only as directed.

Semicid™

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Home Products Corporation is a Delaware corporation with its principal place of business at 685 Third Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

This order applies to respondent American Home Products Corporation, its successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with respondent's advertising, offering for sale, sale or distribution of Semicid or any OTC (over the counter) contraceptive product in or affecting commerce within the United

States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this order are not intended to set a standard for drug products other than OTC contraceptives.

For purposes of this order, the following definitions shall apply:

1) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "Method effectiveness" means that level of effectivenes which is attained in a well-controlled clinical trial utilizing highly motivated volunteers who reportedly use the contraceptive method correctly with every act of sexual intercourse.

3) "Semicid" means the vaginal contraceptive suppository product marketed under the tradename Semicid, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

4) "Advertisement" means any written, verbal or audio-visual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; *provided, however*, that the term advertisement does not include material which solely refers to the product without making any claims for the product.

5) "Product or use characteristic" includes but is not limited to efficacy, safety or convenience.

I.

It is ordered, That respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Semicid which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product.

C. Representing, directly or by implication, that Semicid has novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Representing, directly or by implication, the results of any study of method effectiveness of any OTC contraceptive product as a measure of the use effectiveness of any such product.

E. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; *provided, however*, that respondent may represent that Semicid is effective or reliable or make other effectiveness claims as permitted by the order (for example, "Semicid provides reliable protection against pregnancy.").

II.

It is further ordered, That respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Semicid:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, ask your doctor if you can use Semicid.

C. Some Semicid users experience irritation in using the product.

D. It is essential that you insert Semicid at least fifteen minutes before intercourse.

E. Semicid is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however*, that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "fifteen minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in typeface at least as large as the typeface of the major portion of the text of the ad copy. Disclosure D and E shall be separate and distinguishable from the main body of the advertisement for a period of 24 months following the date of service of this order or 27 months from the date of signing of this order, whichever expires earlier.

III.

It is further ordered, That respondent make the following affirmative disclosure in any consumer (lay) print advertisement for Semicid in which any product or use characteristic of Semicid is compared, directly or by implication, to any product or use characteristic of oral contraceptives or intrauterine devices:

Semicid is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

Semicid is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the ad specified for Disclosure II.E.

IV.

It is further ordered, That respondent make the following disclosures in any consumer (lay) TV advertisements for Semicid:

A. Follow directions exactly, including the fifteen minute waiting period.

B. Approximately as effective as contraceptive foams.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however*, that if respondents have a reasonable basis, consisting of valid scientific test(s) or study(ies), respondents may modify the words "fifteen minutes" in Disclosure A consistent with such reasonable basis.

V.

It is further ordered, That respondent make the following disclosure in any consumer (lay) radio advertisements for Semicid:

Semicid's effectiveness is approximately equal to contraceptive foams.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI.

It is further ordered, That respondent shall make the following disclosures in ethical (professional) advertisements for Semicid:

A. Irritation accompanies use of the product in some instances.

B. Semicid must be inserted according to product instructions and at least fifteen minutes before intercourse.

C. Semicid is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

Semicid is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same or substantially similar to the language set forth above; *provided, however*, that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "fifteen minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the ad copy.

If respondent has a reasonable basis, consisting of a consistent body of valid and reliable scientific evidence, for any change in disclosures contained in Paragraphs II.A, B, C or E, III, IV.B, V and VI.A or C above, respondent may petition the Commission for appropriate modification of this order.

VII.

It is further ordered, That respondent cease and desist from:

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mails or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I. A–D of this order or fails to include any of the disclosures required by this order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Semicid or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I. A–D of this order or fails to include any of the disclosures required by this order.

VIII.

It is further ordered, That respondent shall, within six (6) months after the date of service of this order, run print advertisements for Semicid in at least two (2) separate issues of at least nine (9) professional (ethical) publications approved by authorized representatives of the Federal Trade Commission. The advertisements required by this paragraph shall comply with Paragraphs I.B–E and VI of this order. Advertisements run after the date of the signing of this order, but prior to the date of service of this order, shall be considered satisfactory compliance with this order.

IX.

It is further ordered, That in advertisements in languages other than English, exact language disclosures required by this order shall be made in the non-English language equivalent and convey the same meaning as the English language disclosures.

X.

It is further ordered, That respondent prepare an informational pamphlet, in a form to be approved by authorized representatives of the Federal Trade Commission, which clearly and conspicuously sets forth the affirmative disclosures specified in Paragraphs II and III above, as well as other information regarding the advantages and disadvantages of various OTC contraceptive methods. The pamphlet shall be at least four (4) pages in length, oriented toward a lay audience, and based upon current labeling of, and published scientific literature regarding OTC contraceptive products. The form of the pamphlet shall be submitted by the respondent to the Federal Trade Commission within sixty (60) days after the date of service of this order. Copies of the pamphlet shall be distributed within sixty (60) days after the date on which the representatives of the Federal Trade Commission serve notice on the respondent that they have approved the form of the pamphlet. Copies of the pamphlet shall be initially distributed to all physicians and other health care professionals engaged in obstetric and gynecological practice or family planning activities who previously received any promotional material concerning Semicid. A cover letter and postpaid reply card shall be provided with the initial mailing of the pamphlet indicating its availability, at no charge, in reasonable quantities upon request. Copies shall also be distributed to retail pharmacies who purchase Semicid directly from respondent with a request that the pamphlet be made available to consumers. Respondent shall thereafter provide, at no charge, additional copies of the pamphlet upon reasonable request for a period of one (1) year.

XI.

It is further ordered, That respondent maintain complete business records relative to the manner and form of its compliance with this order. Such records shall include but not be limited to, copies of and dissemination schedules for all advertisements; documents which substantiate or contradict any claim made in advertising, promoting or selling the product; and an affidavit of compliance with Paragraph X of this order. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

XII.

It is further ordered, That respondent forthwith deliver a copy of this order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Semicid or in any aspect of the preparation, creation or placing of advertising for Semicid on behalf of respondent. A statement acknowledging receipt of this order shall be obtained in each case.

XIII.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in a corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporations which may affect compliance obligations arising out of this order.

XIV.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report setting forth in detail the manner and form in which it has complied with this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

MORTON-NORWICH PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3024. Complaint, June 19, 1980—Decision, June 19, 1980

This consent order requires, among other things, a Chicago, Ill. manufacturer of pharmaceutical products to cease making any misrepresentations of the efficacy or novel performance characteristics of its vaginal contraceptive suppository products. The order specifically prohibits any exaggerated efficacy claims for the products such as "highly" or "extremely" effective. Additionally, respondent is prohibited from making claims of efficacy without a reasonable basis consisting of a consistent body of valid and scientific evidence. Respondent is also required to distribute an information pamphlet discussing the advantages and disadvantages of various over-the-counter contraceptive methods as well as setting for the specifically required affirmative disclosures.

Appearances

For the Commission: *Susan Lerner, Barry E. Barnes* and *Rachel Wolkin Sesser.*

For the respondents: *Richard B. Lavine* and *Edward A. Geltman, Squire, Sanders & Dempsey*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc., corporations (hereinafter "respondents"), have violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Morton-Norwich Products, Inc. is a Delaware corporation with its principal place of business at 110 N. Wacker Drive, Chicago, Illinois.

Eaton-Merz Laboratories, Inc. is a Delaware corporation with its principal place of business at 17 Eaton Ave., Norwich, New York. It is a joint venture owned in equal shares by Morton-Norwich Products, Inc. and Merz and Co., Chemische-Fabrik of Frankfurt, Federal Republic of Germany.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

(1) A "vaginal contraceptive suppository" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

(2) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

(3) "Commerce" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent Morton-Norwich Products, Inc. engages in the manufacturing, advertising, offering for sale and sale of pharmaceutical products, including a vaginal contraceptive suppository product named "Encare" or "Encare Oval" (hereinafter "Encare") a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

Respondent Eaton-Merz Laboratories, Inc. engages in the advertising, distribution, offering for sale and sale of Encare.

PAR. 4. Respondent Morton-Norwich Products, Inc., causes its products when sold, to be shipped and distributed from its place of business to purchasers located in various other States of the United States and the District of Columbia. Respondent Morton-Norwich Products, Inc. maintains a substantial course of trade in all its products, including its product Encare, in or affecting commerce.

Respondent Eaton-Merz Laboratories, Inc. causes its products when sold, to be shipped and distributed from its place of business to purchasers located in various other States of the United States and the District of Columbia. Respondent Eaton-Merz Laboratories, Inc. maintains a substantial course of trade in or affecting commerce in all its products, including its product Encare.

PAR. 5. In the course and conduct of their business respondents, separately or cooperatively, disseminate or cause to be disseminated certain advertisements concerning Encare (1) by United States mails, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio broadcasts of interstate transmission, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare, or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare in or having an effect upon commerce.

PAR. 6. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the advertisements identified as Attachments 1 and 2 which are incorporated by reference herein.

PAR. 7. Through the use of such advertisements, and others not specifically set forth herein, respondents represent, directly or by implication, that:

1. Encare has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill" or intrauterine devices (hereinafter "IUD").
2. Encare has novel contraceptive performance characteristics.

PAR. 8. In truth and in fact:

1. Encare's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.
2. Encare does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertisements and representations referred to in Paragraph Six and Seven are false, deceptive, or misleading.

PAR. 9. At the time respondents made the representations alleged in Paragraph Seven, respondents had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 10. Through dissemination of the advertisement identified as Attachment 2, respondents market or advertise Encare without disclosing to the purchasing public through the advertising that:

1. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
2. Some Encare users experience irritation in using the product.
3. Encare requires a waiting period of ten minutes before intercourse.

PAR. 11. Furthermore, respondents market or advertise Encare without disclosing to the purchasing public through the advertising that:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 12. The facts described in Paragraphs Ten and Eleven are material with respect to the consequences which may result from use of Encare as a contraceptive under such conditions as are customary or usual. Respondents' failure to disclose these material facts renders the advertisements referred to in Paragraphs Five and Six false, deceptive or misleading.

PAR. 13. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondents, directly or by implication, favorably compare some characteristics of Encare to the pill or the IUD and represent in the same advertisement that Encare has an extremely high use effectiveness. Favorable comparison of Encare to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Encare's use effectiveness is equal to that of the pill or IUD. Respondents fail to disclose the fact that Encare has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

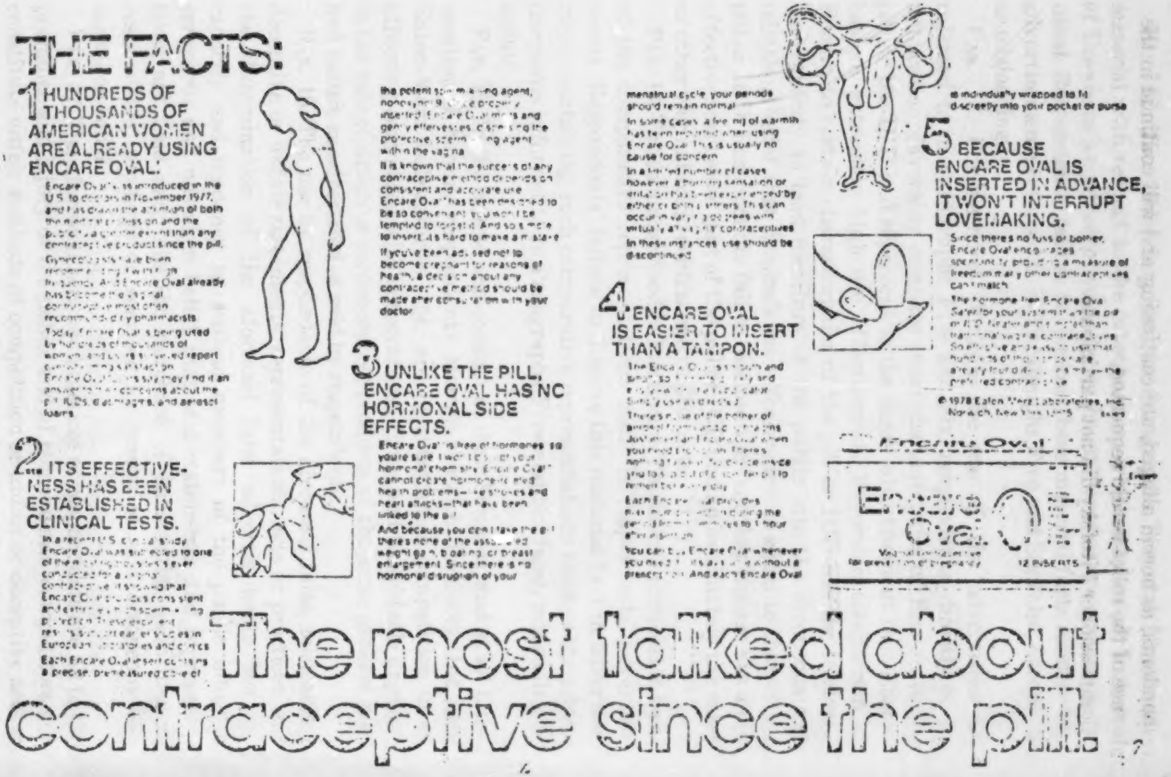
PAR. 14. The fact described in Paragraph Thirteen is material in light of the comparative representations made in respondents' advertisements. Respondents' failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Five and Six false, misleading or unfair.

PAR. 15. In the course and conduct of their business, and at all times mentioned herein, respondents Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc. are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of drugs or contraceptive products of the same general kind and nature as advertised or sold by respondents.

PAR. 16. The use by respondents of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices, and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' products or services by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.



THE FACTS:

1 HUNDREDS OF THOUSANDS OF AMERICAN WOMEN ARE ALREADY USING ENCARE OVAL.

Encare Oval was introduced in the U.S. to doctors in November 1977, and has drawn the attention of both the medical profession and the public to a greater extent than any contraceptive product since the pill.

Gynecologists have been recommending it with high frequency. And Encare Oval already has become the vaginal contraceptive most often recommended by pharmacists.

Today Encare Oval is being used by hundreds of thousands of women, and users surveyed report overwhelming satisfaction. Encare Oval users say they find it an answer to their concerns about the pill, IUDs, diaphragms, and aerosol foams.

2... ITS EFFECTIVENESS HAS BEEN ESTABLISHED IN CLINICAL TESTS.

In a recent U.S. clinical study Encare Oval was subjected to one of the [illegible] ever conducted for a vaginal contraceptive. It showed that Encare Oval provides consistent and [illegible] sperm-killing protection. These excellent results [illegible] earlier studies in European laboratories and clinics.

Each Encare Oval insert contains a precise, premeasured dose of the potent sperm-killing agent, nonoxynol 9. Once properly inserted, Encare Oval melts and gently effervesces, dispersing the protective, sperm-killing agent within the vagina.

It is known that the success of any contraceptive method depends on consistent and accurate use. Encare Oval has been designed to be so convenient you won't be tempted to forget it. And so simple to insert, it's hard to make a mistake.

If you've been advised not to become pregnant for reasons of health, a decision about any contraceptive method should be made after consultation with your doctor.

3 UNLIKE THE PILL, ENCARE OVAL HAS NO HORMONAL SIDE EFFECTS.

Encare Oval is free of hormones, so you're sure it won't [illegible] your hormonal chemistry. Encare Oval cannot create hormone-related health problems—like strokes and heart attacks—that have been linked to the pill.

And because you don't take the pill there's none of the associated weight gain, bloating, or breast enlargement. Since there is no hormonal disruption of your menstrual cycle, your periods should remain normal.

In some cases, a feeling of warmth has been reported when using Encare Oval. This is usually no cause for concern.

In a limited number of cases, however, a burning sensation or irritation has been experienced by either or both partners. This can occur in varying degrees with virtually all vaginal contraceptives. In these instances, use should be discontinued.

4 ENCARE OVAL IS EASIER TO INSERT THAN A TAMPON.

The Encare Oval is [illegible]

There's none of the bother of [illegible]. Just insert an Encare Oval when you need [illegible]. There's nothing [illegible] to remember [illegible] every day.

Each Encare Oval provides [illegible]

You can buy Encare Oval whenever you need it. It's available without a prescription. And each Encare Oval is individually wrapped to fit discreetly into your pocket or purse.

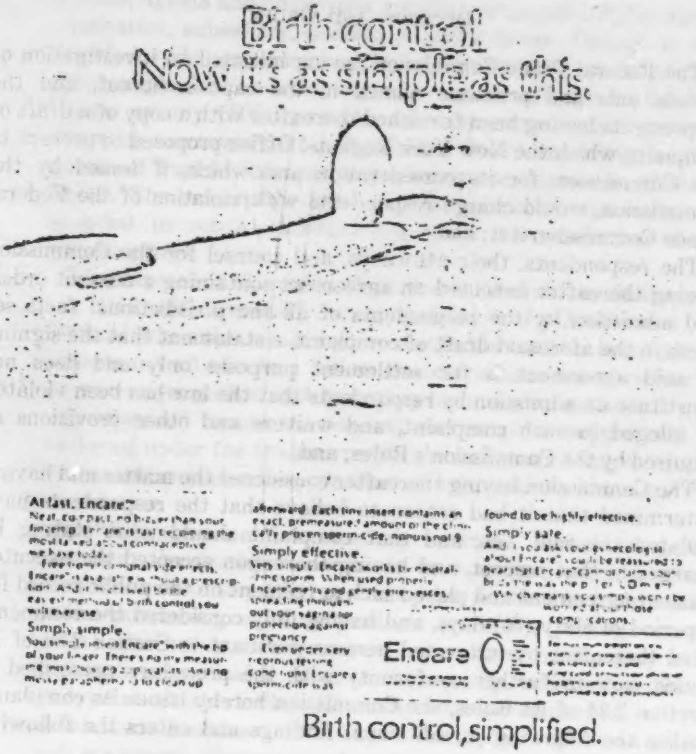
5 BECAUSE ENCARE OVAL IS INSERTED IN ADVANCE, IT WON'T INTERRUPT LOVEMAKING.

Since there's no fuss or bother, Encare Oval encourages spontaneity, providing a measure of freedom many other contraceptives can't match.

The hormone-free Encare Oval. Safer for your system than the pill or IUD. Neater and simpler than [illegible] vaginal contraceptives. So effective and easy to use that hundreds of thousands are already finding [illegible] the preferred contraceptive.

© 1978 Eaton-Merz Laboratories, Inc. Norwich, New York [illegible]

The most talked about contraceptive since the pill.



Birth control!
Now it's as simple as this.

At last. Encare™.
Neat, compact, no bigger than your fingertip. Encare™ is fast becoming the most talked about contraceptive we have today.

Free from chemical side effects. Encare™ is available without a prescription. And it might well be the easiest method of birth control you will ever use.

Simply simple.
You simply insert Encare™ with the tip of your finger. There's no messy measuring, no clumsy applicators. And no messy paraphernalia to clean up afterward. Each tiny insert contains an exact, premeasured amount of the clinically proven spermicide, nonoxynol 9.

Simply effective.
Very simply, Encare™ works by neutralizing sperm. When used properly, Encare™ melts and gently effervesces, spreading throughout your vagina for protection against pregnancy.

Even under very rigorous testing conditions, Encare's spermicide was found to be highly effective.

Simply safe.
And if you ask your gynecologist about Encare™ you'll be reassured to hear that Encare™ cannot harm your body the way the pill or IUD might.

Which means you simply won't be worried about those complications.

Birth control, simplified.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Morton-Norwich Products, Inc. is a Delaware corporation with its principal place of business at 110 N. Wacker Drive, Chicago, Illinois.

Respondent Eaton-Merz Laboratories, Inc. is a Delaware corporation with its principal place of business at 17 Eaton Ave., Norwich, New York. It is a joint venture owned in equal shares by Morton-Norwich Products, Inc. and Merz and Co., Chemische-Fabrik of Frankfurt, Federal Republic of Germany.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

This order applies to respondent Morton-Norwich Products, Inc. and respondent Eaton-Merz Laboratories, Inc., their successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with either respondent's advertising, offering for sale, sale or distribution of Encare or any OTC (over the counter) contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this order are not intended to set a standard for drug products other than OTC contraceptives.

For purposes of this order, the following definitions shall apply:

1) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "Encare" means the vaginal contraceptive suppository product marketed under the tradename Encare or Encare Oval, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

3) "Advertisement" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; *provided, however*, that the term advertisement does not include material which solely refers to the product without making any claims for the product.

4) "Product or use characteristic" includes but is not limited to efficacy, safety or convenience.

I.

It is ordered, That each respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Encare which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product.

C. Representing, directly or by implication, that Encare has novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; *provided, however*, that respondents may represent that Encare is effective or reliable or make other effectiveness claims as permitted by this order (for example, "Encare provides reliable protection against pregnancy").

II.

It is further ordered, That each respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Encare:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, you should ask your doctor which contraceptive method, including Encare, is best for you.

C. Some Encare users experience irritation in using the product.

D. It is essential that you insert Encare at least ten minutes before intercourse.

E. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however*, that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in type at least as large as the type face of the major portion of the text of the ad copy. Disclosures D and E shall be separate and distinquishable from the main body of the advertisement for a period of 24 months following the date of service of this order or 27 months from the date of signing of this order, whichever expires earlier.

III.

It is further ordered, That each respondent make the following affirmative disclosure in any consumer (lay) print advertisement for Encare in which any product or use characteristic of Encare is compared, directly or by implication, to any product or use characteristic of oral contraceptives or intrauterine devices:

Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the ad specified for Disclosure II.E.

IV.

It is further ordered, That each respondent make the following disclosures in any consumer (lay) TV advertisements for Encare:

A. Follow directions exactly, including the ten minute waiting period.

B. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however*, that if respondents have a reasonable basis, consisting of valid scientific test(s) or study(ies), respondents may modify the words "ten minutes" in Disclosure IV.A consistent with such reasonable basis.

V.

It is further ordered, That each respondent make the following disclosure in any consumer (lay) radio advertisements for Encare:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI.

It is further ordered, That each respondent shall make the following disclosures in ethical (professional) advertisements for Encare.

A. Irritation accompanies use of the product in some instances.

B. Encare must be inserted according to product instructions and at least ten minutes before intercourse.

C. Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same as or substantially similar to the language set forth above; *provided, however*, that if respondents have a reasonable basis, consisting of valid scientific test(s) or study(ies), respondents may modify the words "ten minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the ad copy.

If respondent has a reasonable basis, consisting of a consistent body of valid and reliable scientific evidence, for any change in disclosures contained in Paragraphs II.A, B, C or E, III, IV.B, V, and VI.A or C above, respondent may petition the Commission for appropriate modification of this order.

VII.

It is further ordered, That each respondent cease and desist from:

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mails or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this Order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this order.

VIII.

It is further ordered, That respondents shall, within six (6) months after the date of service of this order, run print advertisements for

Encare in at least two (2) separate issues of at least nine (9) professional (ethical) publications approved by authorized representatives of the Federal Trade Commission. The advertisements required by this paragraph shall comply with Paragraphs I.B–D and VI, of this order. Advertisements run after the date of the signing of this order, but prior to the date of service of this order, shall be considered satisfactory compliance with this order.

IX.

It is further ordered, That respondents prepare an informational pamphlet, in a form to be approved by authorized representatives of the Federal Trade Commission, which clearly and conspicuously sets forth the affirmative disclosures specified in Paragraphs II and III above, as well as other information regarding the advantages and disadvantages of various OTC contraceptive methods. The pamphlet shall be at least (4) pages in length, oriented toward a lay audience, and based upon current labeling of, and published scientific literature regarding OTC contraceptive products. The form of the pamphlet shall be submitted by the respondents to the Federal Trade Commission within sixty (60) days after the date of service of the order. Copies of the pamphlet shall be distributed within sixty (60) days after the date on which the representatives of the Federal Trade Commission serve notice on the respondents that they have approved the form of the pamphlet. Copies of the pamphlet shall be initially distributed to all physicians and other health care professionals engaged in obstetric and gynecological practice or family planning activities who previously received any promotional material concerning Encare. A cover letter and postpaid reply card shall be provided with the initial mailing of the pamphlet indicating its availability, at no charge, in reasonable quantities upon request. Copies shall also be distributed to retail pharmacies who purchase Encare directly from respondents with a request that the pamphlet be made available to consumers. Respondents shall thereafter provide, at no charge, additional copies of the pamphlet upon reasonable request for a period of one (1) year.

X.

It is further ordered, That each respondent maintain complete business records relative to the manner and form of its compliance with this order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements; documents which substantiate or contradict any claim made in advertising, promoting or selling the product; and an affidavit of compliance with

Paragraph IX of this order. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice each respondent shall make any and all such records available to Commission staff for inspection or photocopying.

XI.

It is further ordered, That each respondent forthwith deliver a copy of this order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Encare or in any aspect of the preparation, creation or placing of advertising for Encare on behalf of respondent. A statement acknowledging receipt of this order shall be obtained in each case.

XII.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in a corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporations which may affect compliance obligations arising out of this order.

XIII.

It is further ordered, That each respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report setting forth in detail the manner and form in which it has complied with this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

SCHLUMBERGER LIMITED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3025. Complaint, June 23, 1980—Decision, June 23, 1980

This consent order requires, among other things, a New York City multinational company, engaged in various activities, including the manufacture of electrical and electronic devices, to divest all stock it owns in the Unitrode Corporation ("Unitrode") within six months from the date of the order. Prior to such divesture, the order requires that respondent treat Unitrode as an independent entity, and refrain from attempting to influence or control Unitrode. Respondent is further prohibited from acquiring any Unitrode stock or assets without prior Commission approval for a period of ten years.

Appearances

For the Commission: *Gordon Youngwood.*

For the respondent: *R. Bruce MacWhorter* and *Stanley I. Rubenfeld, Shearman & Sterling*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, subject to the jurisdiction of the Commission, has acquired Fairchild Camera and Instrument Corp. ("Fairchild"), a corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

(a) "Respondent" shall mean Schlumberger Limited, a corporation, and its subsidiaries, affiliates, successors and assigns; and

(b) "Diodes" shall mean semiconductor products consisting of a two-electrode device which passes current in one direction but not in the opposite direction.

II. RESPONDENT

2. Respondent is a corporation organized and doing business under and by virtue of the laws of the Netherlands Antilles, with its principal executive offices at 277 Park Ave., New York, New York.

3. Respondent is a multinational company with significant operations in the United States and Europe. Its primary activities are wireline services of oil fields, the drilling and servicing of oil wells and the manufacture of a multitude of electrical and electronic devices. In 1978, Respondent had total foreign and domestic assets of $2.95 billion and total sales of $2.7 billion.

4. At all times relevant herein, Respondent has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. UNITRODE CORPORATION

5. Unitrode Corporation ("Unitrode") is a corporation organized and doing business under and by virtue of the laws of the State of Maryland, with its principal executive offices at 580 Pleasant St., Watertown, Massachusetts.

6. Unitrode is engaged in the manufacture of diodes and other electronic components. In fiscal year 1979, Unitrode had total assets of $40.2 million and sales of $48.4 million.

7. Since March 1978, Respondent has purchased approximately 496,000 shares of Unitrode common stock, which total constitutes 17.1% of all outstanding Unitrode shares. As of June 1979, Respondent was the largest holder of Unitrode common stock.

8. From March 1978 to date, Respondent has had and now has substantial opportunities to influence the business operations of Unitrode.

9. At all times relevant herein, Unitrode has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. FAIRCHILD CAMERA & INSTRUMENT CORPORATION

10. At the time of the acquisition, Fairchild was a corporation organized and doing business under and by virtue of the laws of the

State of Delaware, with its principal executive offices at 464 Ellis St., Mountain View, California.

11. Fairchild's primary operations are in the manufacturing of diodes and other semiconductors, automatic test systems, and reconnaissance and surveillance systems. In 1978, its total assets were $423 million and its total sales were $534 million.

12. At all times relevant herein, Fairchild has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V. ACQUISITION

13. On May 19, 1979, Schlumberger and Fairchild entered into an agreement under which Respondent agreed to the purchase by Schlumberger (California) Inc., a wholly-owned subsidiary of Respondent, of all outstanding Fairchild shares for $66 per share. The transaction was valued at $363 million as of June, 1979. More than 97% of Fairchild shares were tendered. Respondent purchased the shares on June 30, 1979. Schlumberger has since acquired the remaining outstanding Fairchild shares.

VI. TRADE AND COMMERCE

14. For purposes of this complaint, the relevant lines of commerce are the manufacture and sale of diodes and submarkets thereof, and the relevant section of the country is the United States as a whole.

15. Sales of diodes in the United States are substantial, amounting to an estimated $343 million in 1977.

16. Fairchild and Unitrode are and have been for many years substantial and actual competitors in the manufacture and sale of diodes.

17. In the year 1977, Fairchild had sales of diodes in the United States of $20.8 million. Unitrode had sales of diodes in the United States of $23.1 million in 1978.

18. Concentration in the manufacture and sale of diodes is high.

19. Barriers to entry into the manufacture and sale of diodes are substantial.

VII. EFFECTS OF THE ACQUISITION

20. The effect of the acquisition of Fairchild by Respondent may be substantially to lessen competition or tend to create a monopoly in the

manufacture and sale of diodes in the United States in the following ways, among others:

(a) Substantial actual and potential competition between Fairchild and Unitrode and other firms in the manufacture and sale of diodes has been eliminated;

(b) Already high concentration in the manufacture and sale of diodes has been increased; and

(c) The likelihood of eventual deconcentration may be lessened.

VIII. THE VIOLATION CHARGED

21. The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Schlumberger Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands Antilles with its office and principal place of business located at 277 Park Ave., in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this order, "Respondent" shall mean Schlumberger Limited, a corporation, and its subsidiaries, affiliates, successors and assigns.

I.

It is ordered, That Respondent, prior to a date not to exceed six (6) months from the date of service of this order, shall divest absolutely to an acquiror or acquirors, subject to the prior approval of the Commission, all stock and other share capital of Unitrode Corporation (Unitrode) held by Respondent, so as to establish Unitrode as a company independent of any other company manufacturing and selling diodes.

II.

It is further ordered, That prior to sixty (60) days from the date on which Respondent is served with this order, Respondent shall present to the Commission:

(a) A final executory contract with an acquiror or acquirors, consistent with Article I above, to divest all stock and other share capital of Unitrode held by Respondent, subject to the prior approval of the Commission; or

(b) a plan for a public offering of all stock and other share capital of Unitrode held by Respondent, subject to the prior approval of the Commission, and reasonably assuring that no more than one percent of the outstanding stock or other share capital of Unitrode is acquired by a person not acceptable to the Commission.

III.

It is further ordered, That, for a period of ten (10) years from the date on which Respondent is served with this order, Respondent shall not acquire, directly or indirectly, through subsidiaries or otherwise, without prior Commission approval, any assets, stock or other share capital of Unitrode or its subsidiaries, affiliates, successors and assigns; *provided, however*, that this paragraph shall not apply to products manufactured by Unitrode in the normal course of its business that are held for sale by Unitrode to its customers and used by Respondent in the manufacture of its products.

IV.

It is further ordered, That prior to the divestiture of Unitrode stock and other share capital required by Paragraph I of this order, Respondent shall:

(a) In all dealings with Unitrode, treat Unitrode on an arm's length basis as an entity independent of Respondent; and

(b) not exercise or seek to exercise influence or control over Unitrode.

V.

It is further ordered, That Respondent notify the Commission at least thirty (30) days prior to any proposed change in Respondent which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of successor corporations or the creation or dissolution of subsidiaries.

In the Matter of

EXXON CORP., ET AL.

Docket 8934. Interlocutory Order, June 30, 1980

Regarding Subpoenas to Congressional Research Service and to Thirteen Executive Branch Agencies and the General Accounting Office

Respondents in this matter, seeking discovery of documents relating to the oil production industry in the possession of thirteen Executive Branch agencies,[1] the Congressional Research Service of the Library of Congress, and the General Accounting Office, petitioned Administrative Law Judge James P. Timony for issuance of subpoenas to the above-named entities. Between February 15 and 21, 1980, Judge Timony issued the requested subpoenas pursuant to Commission Rule of Practice 3.36. We stayed the return date on the subpoenas on February 28, 1980, to consider whether the Commission has the authority to issue them.

Both respondents and complaint counsel contend that Section 9 of the FTC Act authorizes the subpoenas issued by Judge Timony. The Department of Justice, in a brief filed on behalf of all subpoena recipients, except the Federal Energy Regulatory Commission, the Department of the Treasury, and the Congressional Research Service, disagrees and asserts that Section 8 of the Act is the sole authority for the Commission to obtain information from Executive Branch agencies, and that Section 9 may not be exercised for that purpose. The Congressional Research Service takes yet another view, and argues that its documents are not subject to Commission process because they are privileged under the congressional immunity for speech or debate.

In brief, we have determined that a request under Section 8 must be made before a subpoena to an Executive Branch agency may be issued, though we hold that the Commission has the authority to issue such a subpoena pursuant to Section 9 if necessary and appropriate, and if a prior request for the material under Section 8 has proved unavailing. We further hold that the documents sought from the Congressional Research Service are beyond the Commission's subpoena authority.

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[1] The thirteen agencies are the Departments of Defense, Energy, Commerce, Interior, Justice, Transportation, State and Treasury, the Interstate Commerce Commission, Environmental Protection Agency, General Services Administration, Central Intelligence Agency, and the Executive Office of the President. We assume that the brief filed by the Department of Justice embodies the position of the President in the matter.

I.

The Justice Department's argument rests upon its belief that Section 8 of the FTC Act[2] is the exclusive grant of authority by which the Commission may obtain access to records of Executive Branch agencies. It finds support for its conclusion in the legislative history of the FTC Act. In pointing out that Section 8 was added to enable the Commission to obtain materials possessed by agencies, the Justice Department cites House of Representatives debates on that section of the bill:

> It appears that in time past there have been jealousies in various departments and bureaus, and at times it was difficult to obtain information from one department of great value to another in work of investigation. 51 Cong. Rec. 8858 (1914) (remarks of Rep. Knowland).

During further debate in the House, concern was expressed that confidential tax returns and census data submitted by companies would be made public under this section. In response, Representative Covington (a member of the committee that drafted the bill) conceded that this was true, but added that presidential control would provide an adequate protection against inappropriate disclosure of the information. He stated that the first draft of the section did not contain the phrase, "when directed by the President," but that the committee had reconsidered:

> We then determined, however, that by limiting the authority to turn over such information by direction of the President, all the safeguards that ought to surround any class of information would be in the possession of the goverament. 51 Cong. Rec. 9045 (1914).

It appears that Congress intended that the Commission have access to information it needed to carry out its mission, but that the President should serve as a "mediator" of interagency disputes and as a decisionmaker regarding the Commission's need for the information. Based on its belief that this represents Congress' intent, the Justice Department argues that Section 8 is an exclusive-grant of authority and, therefore, that Section 9 cannot be used as an alternate means of obtaining government documents because Section 9 contains no similar provision for presidential discretion. It sets up instead a system of judicial enforcement of Commission subpoenas. Thus, if the Commission were able to compel production of documents pursuant to Section 9, the safeguard established by Executive review could be avoided by the Commission, and Congress' intent frustrated.

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[2] Section 8 of the FTC Act states:

> The several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the Commission as he may direct.

This analysis has much force, and we agree that the grant of authority in Section 9 may not be exercised so as to make the Presidential prerogative in Section 8 a nullity. However, the Justice Department's conclusion—that Section 8 is therefore the *exclusive* means by which the Commission may obtain information from Executive Branch agencies—does not necessarily follow. Indeed, such a conclusion would be inconsistent with Congress' intention in granting the Commission quasi-judicial authority and with the rights of respondents in an adjudication.

The Supreme Court long ago established that:

> **The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the Executive. Its duties are performed without Executive leave and, in the contemplation of the statute, must be free from Executive control. *Humphrey's Executor* v. *U.S.*, 295 U.S. 602, 628 (1935).**

Foremost among the Commission's "quasi-judicial" powers is the conduct of adjudications under Section 5(b) of the FTC Act. These proceedings are, of course, conducted strictly in accordance with the framework for adjudicatory decisionmaking later prescribed by Congress in the Administrative Procedure Act. The FTC Act and APA alike ensure that all decisions in an adjudication are made by an administrative law judge, the Commission itself, or a Federal court in an enforcement or review action. Presidential involvement in any aspect of adjudicatory decisionmaking would be fundamentally inconsistent with this statutory scheme. Yet if the Justice Department's position were adopted, a President's decision to deny access to information necessary to a proceeding would amount to just such involvement.

Such Presidential involvement in an adjudication is the more problematic because it may infringe upon the rights of private parties. The Commission's discovery rules reinforce and amplify a respondent's right under the APA to exercise the agency's subpoena authority in aid of its defense. See 5 U.S.C. 555(d). If, however, Section 8 were the exclusive means for access to Executive Branch information, a respondent would be able to obtain potentially exculpatory information only by grace of an exercise of Presidential discretion, the refusal of which would evidently be a discretionary act beyond judicial review.

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Cf. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 102 (1948).

In these circumstances, we think that a proper reading of the interrelationship between Sections 8 and 9 must harmonize the competing considerations, so that Congress' intent be fully preserved, that is with Presidential prerogative and adjudicatory independence alike maintained. This end may be achieved, we believe, if Section 8 is understood as a *prerequisite* to the potential use of Section 9. In this way the President will be afforded the opportunity initially to determine the extent to which requested documents will be made available. Should he decline to direct the furnishing of certain information or decline to involve himself in deciding one way or the other whether the requested material should be furnished, the Commission may thereafter determine, in its adjudicatory capacity, whether to issue a subpoena to the particular agency to obtain the information.

We emphasize that such a subpoena will be issued only in the most compelling circumstances. The applicable rule requires that a subpoena to another governmental agency not be issued unless the motion for issuance of the subpoena makes not only the showing required for any use of discovery but also "a specific showing that the information or material sought cannot reasonably be obtained by other means." Rules of Practice Section 3.36(b). If a party requests information of another government agency, the administrative law judge shall carefully consider the relevance of the requested information and its availability through other means. If, after consideration of these and other factors properly within his discretion, see Rules of Practice Section 3.31(c), the law judge believes that the request should be sent pursuant to Section 8, he shall certify the matter to the Commission. In the event that material requested by the Commission under Section 8 is not made available, and if a party thereupon moves for issuance of a subpoena, the law judge may issue such subpoena if the requirements of the rule are met.

II.

We next consider whether Section 9 can be read to authorize subpoenas to the agencies served in this matter. With the exception of the Congressional Research Service, we decide that it can. Section 9 authorizes the Commission to issue subpoenas to "persons, partnerships or corporations." Thus, service on an agency head brings such subpoenas within the scope of the statute. See, *e.g.*, *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) (Secretary of the Air Force served with subpoena under Federal Rule of Civil Procedure 45) and *Boeing Airplane Co.* v. *Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960) (Chairman of the Renegotiation Board served).

Although agencies are not, and could never be, proper subjects of FTC investigations, it is settled that that is not a prerequisite to issuance of a subpoena. See *FTC* v. *Cockrell*, 431 F. Supp. 561 (D.D.C. 1977). Further, we can see no reason why a distinction should be drawn between agencies and any other third party holding relevant evidence for purposes of subpoenas.[3] Accordingly, we agree with complaint counsel and respondents that Section 9 authorizes the subpoenas issued here, with the exception of the subpoena to the Congressional Research Service (CRS).

III.

Our interlocutory order In the Matter of Grand Union, Docket No. 9121, issued today, sets out our conclusion that the subpoena issued to a congressional committee must be quashed. The reasoning provided there applies equally to the subpoena issued to the CRS, a dependent branch or arm of Congress. In transforming the Legislative Reference Service into the CRS in 1970, Congress specified that CRS' duties were primarily to assist Congress and its committees in the "analysis, appraisal, and evaluation of legislative proposals." 2 U.S.C. 166(d). The legislative history of the statute further reflects the view that Congress envisioned a close relationship between itself and CRS, in which CRS would play a supporting role for Congress' legislative function. The House Report states: "These analyses and appraisals [supplied by CRS] will be directed toward assisting committees in determining the advisability of enacting legislative proposals, of estimating the probable results of such proposals and alternatives thereto, and of evaluating alternative methods for accomplishing the results sought." H.R. Rep. No. 91-1215, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4417, 4434.

The Fourth Circuit has noted that CRS performs a legislative function, even though the Library of Congress, of which CRS is a separate department, may have other nonlegislative functions. *Eltra* v. *Ringer*, 579 F.2d 294, 301 (4th Cir. 1978). See also *Kissinger* v.

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[3] We think that the principle stated by the Supreme Court in *United States* v. *Nixon*, 418 U.S. 683, 709 (1974), where it held that the President was subject to a third party judicial subpoena, is as pertinent in this context as well:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the Rules of Evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Reporter's Committee for Freedom of the Press, 48 U.S.L.W. 4223, 4225 (March 3, 1978) (Lower court holding that Library of Congress not an "agency" for purposes of the Freedom of Information Act not disturbed by Supreme Court).

Because of its essentially legislative function, documents requested by the Commission's subpoena would most likely be those produced by CRS on request of Congress and in aid of its legislative role. There can be little argument that documents produced to aid Congress in making decisions regarding proposed or anticipated legislation are an integral part of Congress' lawmaking function, or that they would reveal motives behind individual legislators' votes. Therefore, we agree with CRS and decide that these documents are privileged under the doctrine of separation of powers and the speech or debate clause, and unobtainable by Commission subpoena.[4]

Accordingly, *it is ordered*, That the subpoena issued to the Congressional Research Service is hereby quashed.

It is further ordered, That the subpoenas issued to the thirteen Executive Branch agencies and to the General Accounting Office are hereby quashed. The matter is remanded to the law judge with instructions to treat the parties' requests for subpoenas as motions that the information be requested pursuant to Section 8. The law judge shall consider these motions in accordance with this order. This consideration shall take into account the arguments raised by the thirteen Executive Branch agencies and the General Accounting Office in their papers filed with the Commission, particularly as they concern the burden of compliance, the relevance of the documents sought, and claims of privilege such as national security privilege. The law judge may order additional briefing if he deems it necessary. Should the law judge conclude that certain information ought to be requested under Section 8, he shall certify his recommendation in that regard to the Commission.

Finally, we note that respondent oil companies have again taken the opportunity to urge that this matter be withdrawn from adjudication to permit the Commission to reassess the merits of the current complaint.[5] Complaint counsel observe in reply that the administrative

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[4] The General Accounting Office also holds a position in the government different from that of the other subpoena recipients. It performs its duties of *inter alia*, auditing all executive branch agencies and reporting specially to Congress as an "agency of the Congress." 31 U.S.C. 65.

In spite of this apparent role as a supporting arm of Congress and with a duty to inform legislators concerning government expenditures, GAO, unlike CRS, has not asserted any form of congressional immunity. Instead, it has aligned itself with the Executive Branch agencies in submitting a joint brief opposing the subpoenas on Section 8 grounds only.

For purposes of the subpoena issued here, then, we conclude that GAO should be categorized with the Executive agencies that received subpoenas.

[5] Certain respondents have also moved for placement on the public record of "all written and oral communications received or generated by the Commission which relate to the Commission's February 28 Order." We hav

(Continued)

law judge, in ordering respondents to make discovery in this matter, has also established an October 31, 1980 deadline by which complaint counsel are to re-assess and narrow the issues in the adjudication, based upon the results of their discovery. It would appear that any reassessment of this matter by the Commission, whether it take the form of withdrawal from adjudication or modification of the complaint upon motion by a party, would be best undertaken shortly after complaint counsel's review of respondents' documents and October filing of the Statement of Issues required by paragraph 2(a) of Judge Timony's Order Re Pretrial Procedures, dated March 12, 1980. Therefore, the motions to withdraw from adjudication are denied.

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simultaneously with issuance of this order, as a matter of discretion, placed on the public record, memoranda from personnel in the Commission's Office of General Counsel that recite conversations—none in any respect violative of the Commission's Rules of Practice or otherwise improper—in connection with this matter. Internal communications between the Commission and its advisory personnel are, of course, not a proper subject for disclosure to either side in an adjudication.

IN THE MATTER OF

THE GRAND UNION COMPANY, ET AL.

Docket 9121. Interlocutory Order, June 30, 1980

QUASHING SUBPOENA ISSUED TO THE JOINT ECONOMIC COMMITTEE OF CONGRESS

On January 20, 1980, Chief Administrative Law Judge Ernest G. Barnes acting on respondent's request issued a subpoena *duces tecum* to Dr. John Albertine, staff director of the Joint Economic Committee of Congress. The subpoena sought data in the Committee's possession that had been used by its consultant, Dr. Bruce Marion, in writing his report for the Committee entitled *The Profit and Price Performance of Leading Food Chains, 1970–1974*. Respondents sought the data for the purpose of cross-examining Dr. Marion, who has been designated by complaint counsel as one of its trial witnesses in the field of economics. On January 22, 1980, the Commission, acting pursuant to its Rule of Practice 3.23, stayed the subpoena to consider whether the Commission has jurisdiction to subpoena a congressional committee.

In Section 9 of the FTC Act, Congress granted the Commission broad subpoena power to compel testimony of witnesses and production of documents. We do not believe, however, that in drafting that section Congress intended to make its own documents subject to Commission process.

The "Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed ***." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935). It would be anomalous indeed if Congress were to compromise its independence under the constitutional separation of powers by subjecting itself, its committees or its staff to any form of compulsion by the agency it created to carry out its will or by the courts in enforcement of agency process. We will not infer such an intention absent a clear, affirmative indication in Section 9's language or legislative history that Congress extended the Commission's subpoena authority to its own legislative activities. We find no such indication.

The absence of such an indication is hardly surprising. For in conferring subpoena power on the Commission, Congress legislated in light of the immunities assured it by the speech or debate clause in Article 1, Section 6, Clause 1 of the Constitution.[1] "In our system, 'the clause serves the additional function of reinforcing the separation of powers so deliberately established by the founders.'" *Eastland* v. *United States Serviceman's Fund*, 421 U.S. 491, 502 (1975).

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[1] The Senators and Representatives . . . shall . . . be privileged from arrest during their attendance at the session of their respective Houses . . .; and for any speech or debate in either House, they shall not be questioned in any other place.

The clause has been held to protect various facets of the legislative process including a report issued by a congressional subcommittee, *Doe* v. *McMillan*, 412 U.S. 306 (1973), and issuance of an investigatory subpoena by a subcommittee, *Eastland* v. *United States Serviceman's Fund, supra*. The Supreme Court has also held that it prevents Grand Jury questioning of a Senator's aide (or the Senator himself) concerning legislative acts of the Senator's subcommittee, *Gravel* v. *United States*, 408 U.S. 606 (1972).

These precedents also indicate that a Commission subpoena to Congress would be unenforceable by a court. See, *e.g.*, *Eastland, supra* at 502 ("the purpose of the [speech or debate] clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently,"); *Gravel, supra* at 617 ("central role" of the speech or debate clause is the prevention of "intimidation of legislators by the Executive and accountability before a possibly hostile judiciary").

The congressional immunity defined by these precedents applies to the documents sought by Grand Union, materials used in preparation of a committee report and obtained by legislative subpoena. The Joint Economic Committee's investigation was patently a proper subject of congressional interest, and the report itself is therefore an integral part of the legislative process. It is in any event beyond the scope of our authority under Section 9.[2]

Accordingly, *it is ordered*, That the subpoena issued by Judge Barnes to the Joint Economic Committee of Congress on January 20, 1980, is hereby quashed.

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[2] In deciding the reach of our subpoena authority under Section 9, we are not authorized to determine whether the information sought relates to a legitimate legislative function. Our point is rather that Congress never intended to authorize us to make such an inquiry because it legislated on the assumption that the doctrine of separation of powers and the speech or debate clause foreclose the issuance of Commission subpoenas to the Congress.

[illegible]

that Congress extended the Commission's subpoena authority to its own legislative activities. We find no such indication.

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